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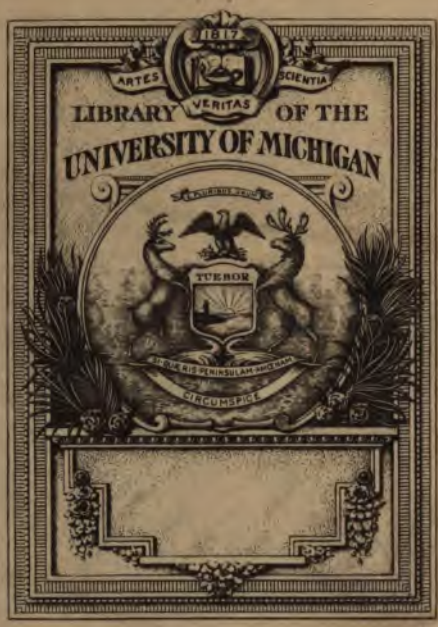

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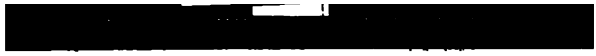

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NEUTRAL RIGHTS;

OR,

AN IMPARTIAL EXAMINATION OF THE RIGHT OF SEARCH OF NEUTRAL VESSELS UNDER CONVOY,

AND OF A

JUDGMENT

PRONOUNCED BY

THE ENGLISH COURT OF ADMIRALTY,

THE 11TH JUNE, 1799,

IN THE CASE OF THE

SWEDISH CONVOY;

WITH SOME ADDITIONS AND CORRECTIONS,

BY MR. J. F. W. SCHLEGEL,

Doctor and Professor of Law in the University of Copenhagen,
Extraordinary Assessor of the High Court of Justice,
Member of several Learned Societies.

TRANSLATED FROM THE FRENCH.

PHILADELPHIA:
PRINTED AT THE AURORA OFFICE, NO. 106, MARKET-STREET—1801.

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NEUTRAL RIGHTS,

AND

THE VISITATION OF NEUTRAL VESSELS

UNDER CONVOY,

FAIRLY EXAMINED.

THE inevitable afflictions of war are not confined to the belligerent powers, they extend to nations perfectly neuter, but in a greater meaſure to maritime nations than to others. This ariſes from the different maxims which have been ſet up from time to time by nations powerful by ſea, or rather becauſe the nations of Europe have never adopted any fixed code of maritime laws. The obſervance of what does not exiſt, is therefore not ſo ſurprizing, as that no effort has been made with ſucceſs to guard nations diſpoſed to peace, againſt the injuſtice of thoſe who might make uſe of their temporary preponderance to give their will as the law.

In land wars, general principles are known, and received, by which the rights of neutral powers are guarded and by means of which the powers diſpoſed to neutrality are free to maintain their internal peace and ſecurity; as has been in the caſe of Ruſſia and Pruſſia, a conſiderable part of Germany in the preſent war, and on many other occaſions in former wars.

In continental wars it has been long deemed contrary to the law of nations, to commit violence on unarmed individuals, though the citizens of a nation at war; and the confiſcation of their property and obſtructions to their commercial communications have been conſidered as unjuſtifiable by the uſages of civilization: a courſe the moſt oppoſite has been purſued in late maritime wars, where it has been allowed to ſeize the veſſels of peaceful merchants, and to confiſcate them and their cargoes, if the citizens or the ſubjects of a belligerent power.

Again, in wars at land, neutral property is held ſacred and inviolable: but in maritime wars, the belligerent powers have authoriſed their public and private ſhips to take veſſels of powers perfectly pacific

pacific and neutral. This procedure has ſometimes, had for its pretext, an aſſumption or a ſuſpicion, that the ſhip or its cargo ſailing under a neutral flag, really belonged to an enemy. At other times the pretext has been that there was concealed on board merchandize, contraband in war (*de contreband de guerre*) under which ſuſpicion, without any other evidence, neutral veſſels have been taken out of their high road, carried into the ports of the belligerent captor, and the legality of the vexatious ſeizure there tried by its courts of admirality; and as no other rules than thoſe which conform with the intereſt and policy of the capturing power is likely to be ſanctioned, judgment for the moſt part giv es condemnation, and the moſt pacific power is ſubjected to the evils of a war in which its intereſts or diſpoſitions are otherwiſe wholly unconcerned.

The ſyſtem of privateering, which modern nations have ſuffered themſelves to countenance, owes its origin to piracy, which indeed it continues to be, though ſanctioned by the authority of *letters of marque* and the pretence of making repriſals. The free States of Italy, and ſome cities of Catalonia and Arragon, were

were in the 11th and 12th centuries in almoſt excluſive poſſeſſion of the maritime commerce of the ſouth of Europe, as the Hanſe towns were of the North. They endeavoured by laws and ordinances to put a ſtop to the depredations on neutral powers, by lawleſs freebooters and rovers, whom the Cruſades had thrown upon the ocean. In the 12th and 13th centuries the celebrated maritime code was formed with this view, called *Il Conſolato del Mare*, wherein it was declared, in relation to the right of cruizers and privateers, that a neutral cargo ſhould be ſafe on board the ſhip of an enemy; but that enemy's property found on board a neutral veſſel, ſhould be deemed lawful prize, ſaving only the right of the freight agreed on from the captor to the neutral owner of the ſhip. In the 14th and 15th centuries almoſt all the treaties were made according to theſe principles. But as abuſes aroſe frequently from the chicanery of agents, when the title of property came to be decided upon, eſpeci-

* Il conſolato de Mare, ch. 273. The beſt edition of this law, is that in 4to, preſerved in 1704 by *Abraham Waterween*, advocate of Amſterdam, beſide a tranſlation of this work into Italian, there is one in Dutch, with critical remarks, which correct the old Italian tranſlation after the original, which was compoſed originally in the old Catalonian or language of Limouſin.

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ally from the time merchants had abandoned the cuſtom of being their own ſupracargoes; and from that period different owners became concerned in various parts of the cargo, another general regulation was ſought by merchants, to ſecure them ſtill more effectually againſt the depredations of privateers.

Then it was that the principle was adopted, of no longer regarding the proprietor of the cargo, but of renderingthe ſhip or flag a ſecurity for all that ſailed under it; and accordingly, that neutral ſhips ſhould no longer be liable to detention, becauſe they might have enemy's property on board, and ſtill leſs becauſe they might be deſtined for ſome enemy's port, ſaving always the caſe of its being laden with what is called contraband of war, (*contreband de guerre*): and that on the contrary neutral property on board an enemy's ſhip ſhould be liable to confiſcation.

This change in the maritime law of Europe was principally affected by the Dutch, who being at that time the carriers of all Europe, found the principle neceſſary to their proſperity. The great body of the treaties concluded from the middle

middle of the ſeventeenth century to the preſent time, are founded on this principle, which towards the cloſe of the eighteenth century has been generally expreſſed in theſe terms, the neutral flag covers the cargo---*Le pavillon neutre couvre la merchandize.*

This principle though ſo very generally accepted, was not wholly ſo: and the navigation, of ne utrals was through the jealouſy, of nations riſing into power and conſideration through the growing importance of commerce mnch embarraſſed. Upon the commencement of a war, the belligerent power guided by the uſual paſſions of ambition, and jealouſy, loſt ſight of the rights of others, and gave to their ſhips of war inſtructions, ſuch as were likely to embarraſs their rivals without regard to the rights of nations or neutrals; the principle of the old law (*Il conſolato del mare*) were taken up to veil this pernicious innovation, and enemy's property found on board neutral veſſels was deemed prize in courts of admiralty ſubſervient, not to the laws of juſtice but, to a local or narrow policy, to political or commercial rivalſhip. They further aggravated this abuſe, by condemning not only the cargo belonging to an enemy, but robbing the

the neutral owner alſo of his freight and ſhip.

Louis XIV. publiſhed a number of ordinances in ſeaſons of peace, reſtoring the old law, and ſuppreſſing even the modifications which had been received as part of it. Spain followed the vicious example; and they exerciſed even againſt powers with whom they had treaties of a contrary obligation, numerous acts of injuſtice, which the arbitrary extenſion given to the expreſſion contraband of war (*contreband de guerre*) afforded too great a latitude. They even ſometimes laid aſide the expreſs proviſion of treaties, under the pretence, that it was in contradiction to the maritime ordinances and regulations for privateers, as if the ſeparate act of one power could anul a ſolemn treaty.

But no power treſpaſſed ſo far upon the liberty of the ſeas and the rights of neutrals as England. Preſuming upon the rapid augmentation of its naval power, after the reſtoration of the houſe of Stuart, the powers of the North became peculiarly obnoxious to its jealouſy and violence. It was from the ports of the Baltic that its rival derived all the materials neceſſary for the equipment of

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that navy which was conſidered as deſigned to diſpute with her the dominion of the ocean. Many writers* have conſidered the plan already laid in the act of navigation, by which England expected to ſecure the excluſive monopoly of the trade of the univerſe. But theſe opinions appear to have been formed after events had ariſen which were not foreſeen.

When the Houſe of Stuart was ſuperceded by the Houſe of Orange, and the Dutch brought within the vortex of the Engliſh policy, in 1689, her pretenſions were carried beyond all former bounds. She undertook to prevent all commerce between foreign nations and France, and obliged the States General of the United Provinces to make a declaration to that effect, tho' ruinous to her intereſts, and maritime proſperity. A treaty between Denmark and Sweden, by which it was declared that they would make repriſals

* Of this opinion was STECK, in his "*Eſſays upon "divers ſubjects relative to navigation and commerce "during war.*" Berlin 1794, p. 2. Alſo of BUSCH, "uber "die durch den jetzigen Krieg veranlaſte Lerrüttung "des Sechandles," Hamburg, 1793, p. 78---82, 131--- "133. Of *Martens* Verſuch über Caper feindliche "Nehmungen und inſonderheit Widernehmungen." Gottingen 1793, p. 36.

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in caſe of aggreſſion, reduced England to the neceſſity of adopting more reaſonable meaſures.

There is one war during which England afforded no juſt cauſe of complaint. The war of the Spaniſh ſucceſſion. Its trade with France was continued even in the midſt of hoſtility. But in the war of the Auſtrian ſucceſſion, a different policy was purſued; aggreſſion was frequent and complaints loud. The injuſtice committed on the Pruſſian commerce was ſo frequent, as to induce FREDERIC II. to ſequeſtrate the monies due to the Engliſh upon Sileſia, by way of mortgage, when that duchy was ceded by Auſtria. The Engliſh complained loudly of this act of retaliation; but FREDERIC cauſed a defence to be publiſhed, in which the rights of neutrals were for the firſt time completely diſcuſſed and maintained. He alledged that the Engliſh miniſtry, itſelf, had acknowledged the rights of neutrals at the commencement of the war, though they had not been admitted in the courts.

The Engliſh government undertook to anſwer the Pruſſian monarch, by publiſhing a conſultation of four lawyers, who undertook to ſuſtain the principles of the

old law, *Il Conſolato del Mare.* But civilians and ſtatesmen were aſtoniſhed to find England, which had progreſſed ſo faſt in every thing elſe, a century behind the reſt of Europe in the knowledge of the law of nations. But how much greater muſt be our ſurprize at this day, when the judgments delivered in prize cauſes during the exiſting war, cite this ſuperannuated law as in full force, and that in contempt of the multiplied and ſolemn acts by which the inviolability of neutral flags ſeemed to be for ever ſecured?

France purſuing the example of England, by way of repriſals, alſo interrupted the veſſels of neutrals, particularly thoſe of the north. During the ſeven years war (1755--1763) the privateers of the belligerent powers captured ſo great a number of Daniſh veſſels, that our government (Denmark) thought it neceſſary to ſend a ſpecial deputation to the two courts, to remonſtrate on theſe reiterated aggreſſions and wrongs. The late counſellor of ſtate, HUBNER, who was employed on this occaſion, developed the rights of the neutral flag in ſo clear a manner,* that men converſant in the law

* On the ſeizure of neutral ſhips at the Hague, 1739, 2 vol. 8vo.

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of nations have with very few exceptions acknowledged the juſtice of the axiom, that the neutral flag covers the merchandize. [*Le pavillon neutre couvre la merchandize.*]

France recognized this principle in its treaty with the United States of America, when they became independent, and engaged in a war with England; the liberal policy which dictated the reſpect for neutrals, extended alſo to the inſtructions for privateers, which were infinitely more moderate than any which had preceded them, tho' ſtill ſhort of the natural principles of the law of nations. The Engliſh on the contrary, authorized their privateers to take every veſſel carrying enemy's property or merchandize contraband of war, expreſsly compriſing therein, materials for ſhip building. The inſtructions were without limitations or exceptions, not even of ſhips belonging to ſtates with which there were treaties to the contrary then actually in force! The natural conſequence of which was, to cover the ſeas with Engliſh privateers, which ſeized indiſcriminately upon all veſſels, neutrals as well as enemies. A conſiderable fleet of Dutch merchantmen, deſtined for France, laden with timber and other materials

materials for ſhip building, was taken and condemned as lawful prize, contrary to the expreſs tenor of the treaty of commerce in exiſtence between theſe nations, and although it was proved that this fleet had ſailed before the declaration of war could be known. This iujuſtice determined Holland to ally herſelf cloſely with France, and to take a part in the war againſt England. It was the foundation of thoſe inteſtine troubles which in the ſequel afflicted that republic formerly ſo flouriſhing.

The apprehenſion of a ſimilar determination on the part of the northern powers, did not prevent the Engliſh from ſeizing the veſſels of Ruſſia, Sweden, and Denmark, without any plauſible reaſon.

The three powers, in order to put an end to acts of violence, ſo unjuſt and deſtructive of their rights and commerce, entered into negociations for promoting their mutual ſecurity, and bound themſelves reciprocally, to defend their flags by the union of their forces, and fitting out ſquadrons every year during the war to cruize for the protection of their commerce. To this alliance Pruſſia and Naples

ples afterwards acceded, and it has formed an epocha in maritime hiſtory under the name of the *armed neutrality*.

The principles which the neutral powers bound themſelves to obſerve by this treaty were :

1. That the cargo of a neutral ſhip, tho' the property of an enemy, ſhould not be ſeized, unleſs the veſſel be found laden with a larger quantity of articles contraband of war, than is neceſſary for the uſe of the voyage.

2. That no merchandize ſhould be deemed contraband of war, but ſuch as was directly uſed in war.

3. That nothing ſhould be carried into the port or city of one belligerent power while blockaded, or ſhut ſo cloſely by the ſhips of war or batteries of the other nation, that a merchant veſſel could not attempt to enter without danger.

Theſe articles were formally communicated by the ſeveral northern powers, to the powers at war, together with the reſolution

reſolution which they had firſt taken, to maintain them by force of arms if neceſſary. France, Spain, and Holland as formally approved of them. England replied in an equivocal manner, but conſiderably modified her naval orders, and yielded in ſullen ſilence to neceſſity; its courts of admiralty became likewiſe more circumſpect, and leſs prodigal of arbitrary decrees, unleſs in caſes where the captured veſſel belonged to a ſtate unprovided with a naval force ſufficiently ſtrong to command reſpect for its flag. The other ſtates of Europe engaged in maritime commerce, ſuch as Auſtria, Portugal, Venice, Tuſcany, Genoa, and the Pope, altho' they did not enter into the alliance with the northern powers, declared themſelves by ordinances and treaties in favor of the rights of neutrals.

From the foregoing ſtatement it appears, that the principle that the neutral flag covers the cargo, was acknowledged ſo early as the middle of the ſixteenth century. In the ſequel it will be ſhewn, that it was claimed at that era by England herſelf, tho' ſince that time no other power has been ſo much oppoſed to the rights of others. Thus then it will appear, contrary to the common pretences of

of Engliſh lawyers, that the rights of neutrals are not new pretenſions ſet up during the American revolution. On the contrary it appears, that the principle was previouſly eſtabliſhed by ſeveral ſpecial treaties long before, and at that time formally recognized and eſtabliſhed by the concurrence of all the maritime powers, and of all the ſtates intereſted in maritime commerce, (England only excepted, and then not oppoſed or denied) not merely as a conventional law, but as a certain rule of the natural law of nations.

In conſequence thereof, the publiciſts conceived a hope, that in all future wars, navigation would enjoy the ſame protection as commerce by land, and that the ſcourge of war would not in future extend to the peaceable and induſtrious citizens of neutral ſtates. But it was very ſoon diſcovered, how little foundation there was for this hope. In the war undertaken by GUSTAVUS III. againſt Ruſſia, he ſuffered himſelf to be led by a temporiſing policy, to forget the very principles of which he had ſo recently ſhewn himſelf the zealous and bold defender. He went farther, and revived the old and ridiculous pretenſion of Sweden, that coined money ought to be compri-

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zed among the merchandize prohibited as contraband of war, and directed his cruiſers to ſeize ſhips bound for Ruſſia with money on board. The order was not however very rigorouſly enforced.

During the preſent war the illuſion has wholly vaniſhed; for none of the anterior wars have ſo fully proven that governments are deaf to the voice of juſtice and the law of nations, when they can ſubſtitute force in their room. Under the abſurd pretence, that the object of the war was not aggrandizement, or a ſiniſter policy, but to puniſh rebels and diſturbers of ſocial order, the Engliſh government ſought at the outſet to adopt againſt France the ſyſtem of famine, which an hundred years before WILLIAM III. attempted to put in practice againſt the ſame country, and that ELIZABETH had attempted to inflict on Spain towards the end of the fifteenth century.* England required in conſequence

* In 1589, queen ELIZABETH took ſixty ſhips belonging to the Hans-Towns, laden with grain and materials for the building of veſſels deſtined for Liſbon, of which Spain was at that time poſſeſſed: ſhe afterwards took the veſſels of ſeveral other neutral powers, with a view, as ſhe publicly declared, to reduce Spain by famine. (*Reduire l'Eſpagne par la famin.*)

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of our government (Denmark) and of ſeveral other neutral ſtates, to prohibit all exportation of grain to France; declaring that it had given orders to ſeize the cargoes of all veſſels laden with grain for that deſtination, paying however, the value to the owners.

This indemnity, announced by the Britiſh government, had its full effect; and though it had not done away the fundamental injuſtice of its pretenſion, it cannot be denied at leaſt, that, in reſpect of neutrals, it has conſiderably ſoftened its rigour.

It may be remembered, with what irreſiſtable arguments our great miniſter, M. BERNSTORFF, too ſoon loſt to Denmark and to all Europe, defended, againſt Britiſh inſinuations, the principles of neutrality which our government (the Daniſh) had adopted. He did not confine himſelf to that; and, convinced that the cauſe of juſtice could not maintain itſelf, unleſs protected by force, Denmark concluded an alliance with Sweden, for the purpoſe of reſtraining, by powerful means, the enterprizes of privateers.

On its part the Engliſh miniſtry, taught by experience, diſcovered at laſt, that the

idea of ſtarving a great people, to make thoſe who oppreſſed them renounce their ambitious projects, was not only unjuſt, but impracticable, and contrary to ſound policy; and that, ſo far from forcing ſuch a people to peace, it could only tend, in fact, to render the war more obſtinate, by conſtantly irritating and driving them to deſpair.

At the beginning of the war, the French government ſeemed diſpoſed to purſue equitable principles, in relation to maritime commerce. The Conſtituent Aſſembly decreed, with the approbation of all Europe, the abolition of [*course en mer*] privateering. It ſought to execute this reſolution, and communicated its intention, for that purpoſe, to the Engliſh government, provided the latter would agree to grant no letters of marque during the war. The propoſition having been rejected, France, it is true, fitted out privateers at the commencement of the war, but in a very ſmall number, and did not exerciſe acts of injuſtice towards neutrals until at a late period. The ſcarcity of grain, and other proviſions, once led the government to lay an embargo upon the neutral veſſels laden with ſuch merchandiſe, for which it promiſed an indemnification

nification, but which has not yet been paid. Moreover, its need of neutrals made it reſpect their rights, in the midſt even of terror. But, after the fall of ROBESPIERRE, privateers were favoured in every way, as the ſure means of weakening England. Acts of violence towards neutral veſſels multiplied in the ſame proportion. They became intolerable when the victories of BONAPARTE had ſhut all the ports of Italy againſt England, and that, by the acquiſition of the maritime forces of Venice, and the alliance with Spain, France had the dominion of the Mediterranean.

Inſtead of checking theſe acts of injuſtice, the legiſlative power authorized them by decrees, and the courts by judgments; which cauſed the repreſentatives and judges to be publicly accuſed of being perſonally intereſted in this ſyſtem of plunder. Finally, as if it had undertaken to do away all diſtinction between friends and enemies, the Legiſlative Body, on the ground of retaliation for the ſyſtem of famine previouſly adopted by England, forbid neutrals all ſort of commerce, in objects of the growth or manufactures of England. This decree was executed with ſuch rigour, that a yard of

Engliſh

Engliſh cloth, or preſumed ſuch, found on board a neutral veſſel, though in every reſpect in the beſt order, was ſufficient to occaſion the ſhip and cargo to be condemned as lawful prize. The injuſtice went even ſo far, as to give to this decree a retro-active effect, by applying it alſo to ſhips which had ſailed before it appeared. It went ſtill further; and though, according to the general uſuage of civilized nations, in caſe of condemnation, the private adventures and effects are always reſtored to the perſons forming the crew, the confiſcations pronounced in France extended to theſe objects in like manner as to all the reſt.*

The Britiſh government, on its part, ſeemed to feel that it was its intereſt to reſpect the rights of neutrals in proportion as they were oppreſſed by France; but ſcarcely had the victory of Admiral NELSON reſtored to the Engliſh a decided dominion on the ſeas, than they abuſed it, by diſturbing the commerce of neutrals.

The French marine being almoſt entirely annihilated by that victory, and the

* All this is clearly ſhewn in a multitude of pamphlets publiſhed at Paris on the ſubject, and which are in part copied in the *Courier du Commerce Danois*.

wants of the maritime commerce of France requiring that the neutrals, whom preceding rigours had kept away, ſhould be invited into its ports, the number of prizes made by the French ſenſibly diminiſhed, in conſequence of the late decrees paſſed by the Legiſlative Body, upon the vigorous and reiterated repreſentations of the Directory.

It is not irrelevant to remark, upon the ſubject of theſe vexations on the part of the belligerent powers, that the neutral ſtates, and particularly the Danes and Swedes, were accuſed at the ſame time in France, of favouring the Engliſh; and, in England, of being the partizans of France! Theſe accuſations, which reciprocally deſtroy each other, are, in my opinion, the beſt proof of the exact neutrality of the northern powers. Their government left commerce to its natural courſe; and the merchants, guided, as they are always, by profit and loſs, ſpeculated with the one or the other of the belligerent powers, according as they found it more or leſs to their advantage.

It was after the reiterated complaints of the merchants, and after having exhauſted, in vain, all the means of official repreſentation

repreſentation with the belligerent powers, that the Daniſh and Swediſh governments at laſt came to a reſolution to protect their commerce, effectually by cauſing their fleets of merchantmen to be convoyed by ſhips of war. Independent of the protection which every ſtate owes to its people, the public proſperity, the progreſs of agriculture, and internal induſtry; the ſubſiſtence of a numerous claſs of faithful and reſpectable ſubjects, being neceſſarily founded as well in Denmark as in Sweden, upon foreign commerce, the reſpective governments could no longer forbear from this meaſure without devoting their ſtates to inevitable ruin. They had ſo much the more reaſon to flatter themſelves with attaining the end propoſed by theſe means, as the nature of the formalities required from the perſons intereſted in the ſhips deſiring to ſail under convoy, afforded the moſt perfect ſecurity, that not only theſe veſſels, but their cargoes, were ſtrictly regulated according to exiſting treaties; and in fact the belligerent powers had, until then, conſtantly reſpected the neutrality of ſhips which ſailing under convoy, were, by reaſon thereof, conſidered under the ſafeguard and reſponſibility of their governments.

However

However well founded this expectation might be it has been diſappointed, like many others. It was ſoon ſeen in the public prints, that the Engliſh had ſucceſſively detained three Swediſh fleets, each of them convoyed by a ſhip of war of their nation. Various reports were ſpread, to juſtify theſe acts of violence, which threw the commercial world into aſtoniſhment mingled with alarm. Having anxiouſly deſired to know the cauſes and the particulars of theſe detentions, chance threw in my way the report of the judgment of the Engliſh Court of Admiralty, by which one of the Swediſh convoys was condemned. The name of Sir WILLIAM SCOTT, who pronounced that judgment, promiſed much. This judge enjoys in England a conſideration merited by his diſtinguiſhed talents, his extenſive acquirements in juriſprudence, and the dignities themſelves to which they have raiſed him. His work indicates great knowledge, and what is more, a ſincere intention to diſcover truth and juſtice. Nevertheleſs, the principles of law on which he acts, appear to me falſe. This work deſerves a profound examination, ſo much the more, as, from the erudition diſplayed in it, and the impartiality which the author profeſſes, it might

might eaſily lead perſons not converſant in the ſcience of the Law of Nations, to adopt his principles, and thus procure the ſanction of public opinion to flagrant injuſtice.* The examination which I propoſe is the more intereſting to Denmark, as the judge declares in his report, the ſatisfaction he feels in having found an opportunity of pronouncing the law, upon the pretenſion (lately ariſen, according to him,) of exempting from all viſitation, merchant veſſels ſailing under convoy; and as he manifeſts a decided approbation of the right of ſearch, without regard to the flag of the ſovereign which protects them.

It is true, that ſome attempts have been made to viſit and take our merchantmen under convoy, but they have been conſtantly repulſed with that firmneſs which characterizes our brave ſailors; and this will ever be the caſe, as long as the memory of JUEL and of TORDENSKIOLD ſhall live among us.

May I be permitted to add, that in applying myſelf to this diſquiſition, I grati-

* There will be found at the end of this treatiſe, a tranſlation of the judgment, in order that the reader may be the better enabled to examine the propoſitions which are here intended to be refuted.

fy,

fy, as much as is in my power, the deſire of Sir WILLIAM SCOTT, who has thought fit to ſubmit his opinion, *not only to the examination of his fellow citizens but to that of the citizens of other countries;* ſeeing theſe are his words, *that the ſubject is one generally intereſting to all ſociety.* If, notwithſtanding all the pains I have taken to come at the truth, I have been miſtaken in the inferences which I have drawn, I ſhall receive with gratitude any explanatory information which may be communicated to me.

Sir WILLIAM SCOTT obſerves, that his judgement ought to be founded not upon the variable maxims of politics, but upon the univerſal and immutable rules of the Law of Nations. According to him, the queſtion ought to be decided by his court in the ſame manner as it ſhould be by an impartial judge at Stockholm. I agree with him in the principle, and I differ from him only in its application. My object is to prove that his judgment has not been given according to thoſe immutable and univerſally acknowledged laws, but upon particular and purely arbitrary conſiderations. I cannot ſay the ſame of the obſervation which he next makes, " that the nature of the preſent war does

"give this country (Great Britain) the "the rights of war relatively to neutral "States, in as large a meaſure as they "have been regularly and legally exer-"ciſed at any period of modern civilized "times." The particular nature of a war may, it is true, produce a change in the reciprocal conduct of the hoſtile ſtates, but it cannot produce any in their conduct with reſpect to neutrals. Does one of the belligerent powers violate the forms which long uſage has eſtabliſhed, to ſoften the rigour of war? Does it endeavour, for example, to excite revolts in the boſom of its adverſary? The other has undoubtedly a right to retaliate. But this right, reſtrained by its nature to the ſtate which has given cauſe for it, cannot be extended to neutral ſtates, which, by the very fact of their neutrality, having continued to treat the belligerent powers in the ſame manner as before the war, have thence a right to require from theſe powers the ſame treatment as in time of peace. Let us ſuppoſe that one of the belligerent powers forgets the ſacred duties of neutrality, it cannnot be underſtood that there thence reſults to the other power a right to violate them alſo on its ſide. Were it otherwiſe, the ſituation of the ſubjects of neutral ſtates would

would be infinitely worſe than that of the ſubjects of belligerent powers; for the latter are ill-treated only by their enemy, whilſt the neutrals, the paſſive play-things of the caprice and injuſtice of both powers, would find themſelves, only becauſe they wiſh to maintain peace, in a ſtate of war with the one and the other. This is, in fact, an event which has taken place in the preſent war.

The circumſtance to which Sir WILLIAM here alludes is, probably, that the preſent war has been occaſioned by a revolution, attended with very great cruelties, and which, according to the apparent plan of thoſe who excited it, threatened to extend its ravages over all Europe. To this I anſwer, that if it were to be ſuppoſed that force of arms could curb theſe ravages, it was for the great powers of Europe to undertake the task, as being nearer to the evil, more directly menaced, and, at the ſame time, in a better ſituation to reſtrain it by their ſtrength, and the extent of their reſources; whilſt, on the contrary, wiſdom preſcribes to ſtates more remote, and leſs powerful, to obſerve a neutrality, which they could not break without endangering their exiſtence, and expoſing themſelves to the greateſt

greateſt calamities. Such is, in particular, the ſituation of Denmark and Sweden. Whether theſe two powers ought or ought not to have remained neutral, is a queſtion upon which their governments alone had a right to decide. And as no power whatever can, with juſtice, force another to abandon its neutrality, it has no better authority to impoſe upon it new burthens, under pretence that it is not oppreſſed by war; particularly, if we recollect that the war has been commenced without its having any notice of it, and that it is continued, and will end, without the intereſt of the neutral power being in any manner taken into conſideration.

The Judge of the Admiralty maintains his opinion on the authority of Baron PUFFENDORF, as expreſſed in a letter written to the famous lawyer GRONINGIUS, who, at the time of the war which England, Holland, and ſeveral other ſtates carried on in 1692 againſt LOUIS the XIVth. had communicated to him his intention of pleading the cauſe of neutral commerce. M. De PUFFENDORF approves, in this letter, « the little attention « which the powers of the north, though « neutral, paid to the complaints of their « merchants

« merchants, ſeeing that the war was di-
« rected againſt a formidable power,
« which threatened all Europe with
« ſlavery, and the Proteſtant religion
« with total deſtruction."

I muſt here, in the firſt inſtance, notice an aſſertion to which the Judge of the Admiralty attaches great importance, by obſerving that PUFFENDORF was not a Swede, as he alledges, but a German; that he was, in fact, in the ſervice of Sweden at the time he compoſed his work *upon the Law of Nature and Nations*; but at the time he wrote that letter, he was in the ſervice of the Elector of BRANDENBURG, who was then at war with France; and in conſequence it is dated at Berlin. It is to be remarked, that his opinion on this point was founded upon motives of policy, not upon axioms of juriſprudence or treaties, and that he ſuppoſes the ſubjects of the neutral ſtates complaining, whilſt their governments have no intention to ſupport them. It is thence eaſy to judge, that this quotation from PUFFENDORF cannot be made to apply to the preſent caſe, which, according to the opinion of Sir WILLIAM SCOTT himſelf, ſhould be decided by the rules of law, or by the variable maxims of policy,

licy, and in which not only the ſubjects of a neutral power, but alſo their government, claim, and far from refuſing its aſſiſtance, has on the contrary, taken them under its immediate protection. Thoſe who ſhall read the whole of this letter of PUFFENDORF, will have reaſon to be ſatisfied that this celebrated publiciſt expreſsly acknowleges the right of neutral powers to protect their merchants by convoys, when they do not trade in merchandiſe prohibited by the laws of war; and that his opinion only applies to manifeſt abuſes of neutrality.* Although the object of the preſent war may be of much

* The following paſſage precedes the phraſe cited by the Judge of the Admiralty, in the letter of PUFFENDORF: "On the other ſide, nevertheleſs, if the kings "of the north can maintain their commerce with "France *by having their merchant veſſels eſcorted by ſhips "of war*, provided that there is nothing contraband on "board, no body will be found to find fault with them, "the law of humanity and of equity not extending ſo "far as to require that a *nation ſhould deprive itſelf of its "profit in favour of another*; but as the avarice of mer- "chants is ſo great, that for the leaſt gain they make no "ſcruple of treſpaſſing beyond the juſt limits, I am not "ſurprized," &c. Here comes the quotation made by the Judge of the Admiralty, in the beginning of his judgment, at the end of this work. The reader will eaſily comprehend the reaſon why he has abſtained from quoting thoſe words which immmediately precede thoſe which he has cited.

greater

greater conſequence than that of any other, England is ſo much the leſs authorized in ſuch pretenſions, as it was by no means through zeal for the maintenance of juſtice, or with the intent to ſupport the conſtitutional governments of the continent, that this war has been commenced. Theſe motives have been frequently mentioned in its progreſs, to irritate the Engliſh people, and inflame foreign nations; but they paſſed for nothing in the firſt determination, which had no other baſis with reſpect to England, than a view purely political, and peculiar to itſelf, that is, the fear ſhe entertained, that by the union of the Auſtrian Low Countries with France, and the free navigation of the Scheldt, a very dangerous rival might be raiſed to her commerce.

I do not preſume that the Engliſh government ſeeks to juſtify its conduct towards neutrals, on the allegation that they have been ſtill more badly treated by the French; for the arbitrary and violent ſteps taken by the latter, being attributable alone to the convulſions inſeparable from a revolutionary ſtate, could not legitimately ſerve for an example to a regular and well-eſtabliſhed power. If this government, which has in ſome reſpects

declared

declared the French nation proſcribed from European ſociety, in conſideration, as it ſays, of its having trampled under foot the right of nations, ſhould, notwithſtanding, take the line of action purſued by that nation, for its rule of conduct towards neutral ſtates, it would be too manifeſt a contradiction. Thoſe who are acquainted with France, the immenſity of its internal reſources, the richneſs of its ſoil, and of its productions of every kind, know that neither a maritime war, nor even the annihilation of its entire maritime commerce, can operate in it a counter-revolution; but that ſuch a great effect can only be produced by a continental war, and ſuch a one too, as is now carrying on.*

This is not, moreover, the firſt time that England has availed itſelf of the particular nature of a war, to juſtify its attempts upon the rights of neutrals. When WILLIAM III. ſought, in 1689, to interdict them all commerce with France, he pretended in the ſame manner, that that war was of a nature which juſtified the employment of extraordinary means, although it was then carried on without

* This treatiſe was written in 1799, at the period of the greateſt ſucceſſes of the Auſtrians and Ruſſians united.

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any neceſſity. A like pretenſion was urged at the beginning of the American war, but Great Britain was ſoon reduced to change her tone. In general, the Engliſh government has almoſt always tried to make its ſeparate cauſe that of all Europe; and its Court of Admiralty has almoſt always ſupported it, by proceeding rather according to the dictates of her policy than the natural principles of the Law of Nations, or the letter of treaties; and that to a degree at which an impartial ſpectator could not, ſometimes, refrain from a ſmile. Theſe are the terms of the judgment of the Engliſh Court of Admiralty pronounced in 1778,* in the caſe of a Daniſh ſhip ſeized on account of ſome ſalted proviſions being found on board, which it was alledged were deſtined for the enemy, merely *because they were ſalted*: « England is loſt, « if neutrals continue to ſupport the ene« mies of the ſtate."

Far from adopting this mode of reaſoning, good at moſt under the meridian of St. Paul's, in London, it will be felt,

* Busch, über die durch den jetzigen Krieg veranlaßte Zerrüttung des Seehandels Hamb. 1793, § 94.

on the contrary, that an enlightened policy preſcribes to England to reſpect the rights of neutrals, in order that the latter may not find themſelves forced againſt their will to make a common cauſe with its enemies, as happened to Holland in the laſt war. But a motive not leſs important, and which ought to have much greater weight in the war, is, that the neutrals maintain a communication reciprocally uſeful for the commerce of belligerent powers, and which, without them, would be entirely interrupted. It is evident that Great Britain would ſuffer an irreparable loſs, if the numerous, and diverſified productions of its ſoil and manufactures ſhould no longer find channels of admiſſion into France, Spain, and Holland, or into the colonies of theſe three powers, where, in time of peace, they have ſuch a conſiderable ſale. The Britiſh government is ſo well convinced of this truth, that it even ſecretly favours the direct commerce which the French have ſo ſtrictly prohibited. If ſuch be the attention which that government thinks it its duty to pay to the ſale of its productions, even in an enemy's country, can it, with any appearance of juſtice, require of the ſtates of the north, that they ſhould abſtain from the ſame commerce for

for the ſale of their principal productions, ſuch as grain in Denmark, iron and timber in Norway and Sweden? Although Sir WILLIAM SCOTT has declared he allows that the powers of the north, under circumſtances ſimilar to the preſent, might prohibit all importation of Engliſh productions to their enemies, I may be permitted, I think, to doubt whether the Engliſh government would pay greater reſpect to this declaration of its Court of Admiralty, than to the complaints of its manufacturers and merchants, for I do not know that it has ever failed to maintain the rights of its flag, in the ſmall number of maritime wars in which it has not been actively engaged.

When, after having declared his opinion upon the nature of the preſent war, the Judge of the admiralty adds, "that it "gives to the Engliſh government the "rights of war relatively to neutral "States, in as large a meaſure as they "have been regularly and legally exer-"ciſed at any period of modern and ci-"vilized times;" we cannot but approve his mode of reaſoning if it applies to theſe words--*legally and regularly exerciſed*--becauſe from thence it reſults, that the *right* which he claims for the preſent war,

war, muſt be founded generally, not upon what has been done, but on what has been done *legally*. I confeſs that the addition of theſe words--« *of modern civilized times*," affords room to doubt whether ſuch has been, in fact, the opinion of the Judge, or whether he has not rather ſought to juſtify the preſent illegalities, by illegalities heretofore committed by civilized nations, and of which hiſtory in general, and that of England particularly, furniſhes but too many examples. This ſecond ſuppoſition ſeems confirmed by the paſſages which follow in the judgment; where the Judge falls into the ſame error with which J. J. ROUSSEAU reproaches GROTIUS, when he ſays,* « His moſt conſtant manner of reaſoning « is, to eſtabliſh always the right by the « fact ;" an error which, if raiſed into a principle, would increaſe diſorder in geometrical proportion among powers; ſince an act of injuſtice once committed would become a title for a thouſand others in future.

The ſecond preliminary obſervation which the Judge has thought proper to make in favour of the captors in the preſent

* Du Contract Social, livre i. chap. 2.

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ſent caſe, is, that the ſeizure of the Swediſh veſſels took place in the Britiſh channel, and not at a diſtance from the coaſt of Great Britain. We know that the Engliſh formerly claimed a right of ſovereignty over what is called the Britiſh Sea (*mare Britannicum*) which they had even ſought to extend on one ſide as far as Cape Finiſterre, in Spain, and on the other as far as Cape Stat, in Norway. The work of SELDEN, *De Mari Clauso*, was written in ſupport of theſe pretenſions, formed for the firſt time under CROMWELL. We know alſo in what a triumphant manner it was refuted by GROTIUS, the defender of the Dutch, in his treatiſe *De Mari Libero*. Holland was, notwithſtanding, obliged to admit that ſovereignty, but the other powers have never acknowledged, in favour of England, any other right upon that part of the ſea, than what naturally belongs to every power over the extent of ſea which may be defended from land, that is, to the diſtance of cannon ſhot; and in caſes where a very narrow arm of the ſea ſeparates two or more ſtates, to the middle line, unleſs treaties or private arrangements extend the right of ſovereignty beyond it. Theſe pretenſions are even now acknowledged as exaggerated by

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the enlightened Engliſh, among whom I ſhall confine myſelf by quoting one irrefragable authority, that of HUME.* The terms of the judgment ſeem alſo to ſhew that Sir WILLIAM SCOTT has not ſought to attribute to his country a greater right upon the ſea, than that which would belong to it according to the principles generally adopted; for he ſays the affair paſſed upon the coaſt of England (cloſe upon the Britiſh coaſt.) However, the expoſition of the fact leaves ſome preſumption, that it was at a certain diſtance, although it cannot be exactly aſcertained, from want of accurate details upon this point. Suppoſing, nevertheleſs, the Swediſh convoy may have been really taken within the limits of the ſea appertaining to Great Britain, if its detention had, from its circumſtances, and the reſpective right of the parties, been illegal on the open ſea, it could not be leſs ſo in a cloſe ſea (*in mari clauso*,) becauſe the reciprocal liberty of commerce, which civilized nations naturally allow to each other, would by ſuch means be violated, and the treaty of commerce between England and Sweden would alſo be infringed to a certain extent. How many complaints would not the Engliſh pour forth, were

* Hiſtory of Great Britain, vol. i. p. 213.

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the Daniſh government, under pretext of a ſovereignty acknowledged in all times by all powers, to detain an Engliſh convoy in the Sound! After theſe preliminary obſervations, the Judge of the Admiralty ſtates the fact of the caſe, as diſcloſed in the depoſitions laid before the Court, and announces that the circumſtances can only be learned from the captors themſelves. The claimants not having ſubmitted any proof in the cauſe, he thinks that this ſilence has eſtabliſhed the truth of the ſtatement in the ſtrongeſt manner. Let me be permitted to remark, that this concluſion would be ſtrictly juſt, if the queſtion related to a matter *purely private*, or which only concerned Daniſh ſubjects, becauſe the latter, according to the uſage univerſally received among the nations of Europe, would be obliged to acknowledge the juriſprudence of the Britiſh Admiralty, although they might diſtruſt its impartiality. But it could not be the ſame in the preſent caſe, which is evidently a *public affair*, in which the Swediſh government is the principal party intereſted, inaſmuch as the matter in diſpute is the detention of a ſhip of war belonging to the ſtate, as well as the detention of all the veſſels under its ſpecial protection. In ſuch a caſe, the court of

Sweden

Sweden, which could not be ſubject to the Engliſh juriſdiction, might conſider beneath its dignity, to communicate its explanatory proofs to the Court of Admiralty, without its ſilence in that reſpect being legally conſidered as an admiſſion of the caſe.

The following is a brief account of the manner in which the fact is ſtated by the Judge :

Captain LAWFORD, who commanded a ſmall Engliſh ſquadron in the channel, having met a Swediſh merchant fleet, under convoy of a frigate of that nation, ſent a perſon on board the frigate to demand information relative to the deſtination and cargo of the fleet. He was anſwered, that it was deſtined for different parts of the Mediterranean, and laden with hemp, iron, pitch and tar. Captain LAWFORD having judged neceſſary to provide himſelf with an order of the lords of the admiralty, reſpecting the line he ought to purſue, he was ordered to detain the merchant veſſels, and carry them into the neareſt Engliſh ports. Upon the communication of this order to the Swediſh commander, he produced his inſtructions, which enjoined him to defend

defend his convoy to the laſt extremity; after which the Swediſh frigate, as alſo the Engliſh ſquadron, made all the neceſſary preparations for battle. Night having come on, the Engliſh poſſeſſed themſelves of the greater part of the Swediſh ſhips. Next morning the Swediſh frigate ſent an armed boat, which took by force an Engliſh officer from one of the Swediſh merchant veſſels, and carried him on board the frigate. She ſent alſo an officer to Captain LAWFORD, to complain that he had taken advantage of the night to take poſſeſſion of the convoy. But after the latter had repeatedly repreſented to the Swediſh commander the impoſſibility of defending himſelf againſt a force ſo ſuperior, the frigate at laſt conſented to follow him into Margate Roads without having fired a ſingle gun. We learn by the public papers, that the commander, as a reward for his complaiſance, has been condemned in Sweden by a court-martial, to loſe his head. At the end of this ſtatement, we find in the judgment of the Admiralty, an examination of the affair in a juridical point of view. Sir WILLIAM is of opinion, that the veſſels detained, and their cargoes, are liable to confiſcation upon two principles, which he does not however diſtin-

guiſh with ſufficient preciſion in his judgment. The one is relative *to the form*; that is, that they refuſed in a violent manner to ſuffer themſelves to be ſearched. The other, which relates to the *merits*, is drawn from this, that the cargo ought to be conſidered as contraband, being for the greater part deſtined for the enemies' ports. We now proceed to examine carefully each of theſe principles, and the arguments uſed in their ſupport.

FIRST PRINCIPLE.

In ſupport of the firſt principle, the Judge of the Admiralty founds himſelf upon the following propoſitions:

1ſt. The right of viſiting and ſearching, ſays he, belongs to every cruizer of a belligerent nation, lawfully commiſſioned, with reſpect to *every merchant veſſel*, without exception: further on, he uſes the expreſſion *every veſſel*, generally. If this right be real, adds he, there muſt exiſt on the part of neutrals, an obligation correſponding with it, without which this right would be null.

2dly. Cruizers cannot be legally deprived of this right, by the interpoſition of a neutral

a neutral ſtate that judges proper to convoy its merchant veſſels with ſhips of war.

3dly. The penalty incurred by refuſal to ſubmit to viſitation, if accompanied with violence, is the confiſcation of the property ſo attempted to be withdrawn from viſitation and ſearch.

ANSWER TO THE FIRST PROPOSITION.

It has been already obſerved in the introduction, that (*course en mer*) privateering, is contrary to the natural right of nations, and to the generally recognized principle, that war is made by ſtate againſt ſtate, and not againſt unarmed individuals; though, by a ſingular contradiction, but too frequently met with in the actions of men, this principle, religiouſly obſerved among the powers of Europe in the wars by land, be not followed in the maritime wars. FREDERIC the Great, that crowned philoſopher, ſtruck with this contradiction at the time he treated with the United States of America, propoſed to them to eſtabliſh, that in caſe of a rupture between the two powers, they ſhould not grant reciprocally any letters of marque. This determination, equally honourable

honourable to the prince who propoſed it, and the United States, which adopted it, will probably have no effect, as there is ſcarcely an appearance, that theſe two powers ſhould ever be in the ſituation of making war againſt each other. It is to be further remarked, that CATHERINE II. in her firſt war againſt the Turks, did not commiſſion any privateers; that ſhe did not licenſe them in the laſt, but under great reſtrictions; and that during the war with Sweden, far from encouraging them, ſhe took pains not to diſturb the commerce of neutrals, although in that point Sweden had indulged in ſome irregularities. Notwithſtanding the very active part which PAUL the Firſt, her ſucceſſor, takes in the war againſt France, we do not hear of any privateers being fitted out of the Ruſſian ports.

This principle, very clear in itſelf, and ſupported by ſuch reſpectable examples, will diſſipate, perhaps, the diſdainful ſmile with which Sir WILLIAM SCOTT receives in his judgment, thoſe who oppoſe the practice of privateering, (*course en mer*) as diſgraceful to the maritime law of nations. This enlightened magiſtrate will feel at leaſt, that an opinion founded upon univerſal morality, and upon juſtice,

tice, adopted by ſovereigns as wiſe as powerful, is badly refuted by the qualification which he gives it, of the « *new* « *philoſophy, or philanthropy*, which tends « to introduce a ſtate of things not yet « ſeen in the world, that of *a military* « *war and a commercial peace.*"

Without reverting to the wars of Ruſſia, which prove that ſuch a ſtate of things is, I do not ſay only poſſible, but compatible with military operations, every body knows that in the midſt of the moſt ſanguinary wars upon the continent, commerce by land continues and the public fairs ordinarily obtain ſafeguards from the enemy's generals, by means of which the merchants and their merchandiſes are protected from all inſult, as well during a fair as on their way to and from it. If the thing be practicable in wars by land, why ſhould it not be alſo practicable in maritime wars? This *philoſophy*, far from being *new*, as is pretended, may on the contrary be traced back to very remote antiquity. The Greeks and Romans, ſuch enlightened nations, never recognized the legality of maritime captures; on the contrary, they conſtantly treated as pirates and enemies of humanity, thoſe who, under any pretence whatever,

whatever, ſhould take peaceable merchantmen. It was in order to put an end to piracy, and to extirpate pirates, that POMPEY maintained ſuch a ſanguinary war in Aſia Minor againſt them.

The origin of privateering (*la course en mer*) hides itſelf in the dark æra of the middle age. This circumſtance does not give a very favourable idea of it. The governments, in rendering it legal, ſought to ſtop the piracies which audacious ſailors might of their own accord think themſelves authorized to commit upon merchants; and during the long ſpace of time which has elapſed ſince that period, privateers, notwithſtanding their commiſſions, have been conſidered as little better than *pirates*. If we conſider the pillage, the vexations, the violence in which they indulge themſelves, in contempt of the moſt ſevere laws, with reſpect even to thoſe veſſels on board of which, notwithſtanding all their ſtratagems, they are unable to diſcover any cauſe for ſuſpicion, this popular opinion will not appear ſo ill founded.

What ſhould determine a wiſe government to the abolition of privateering (*la courſe en mer*) is, that it is inconteſtably the

the ſchool in which are formed thoſe dangerous ſmugglers, and thoſe men capable of every thing; who diſturb ſociety by their acts of violence. I ſhall not dwell upon the immorality which it occaſions in neutral ſtates, and the means, very far from juſt, to which the merchants of thoſe countries are ſometimes forced to have recourſe, to ſhelter their property from this ſpecies of brigandage. The belligerent powers care little about it; but can they be indifferent to the corruption which it eventually produces among their ſubjects?

The principal obſtacle to the abolition of privateering, is the advantage which the belligerent powers promiſe themſelves from it: but it cannot be compared either with the loſſes which their commerce ſuffers, or the other inconveniences attached to it. The French, during the preſent war, have certainly gained very much by their privateers; but their government, notwithſtanſting, has judged fit of late, to reſtrain them a little; their own maritime commerce with foreign countries is annihilated. The more privateers are fitted out, the more difficult it becomes for ſhips of war to procure the neceſſary number of ſailors, that

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ſervice being more lucrative. In length of time, the captures do no material injury to the belligerent powers, but only to neutrals. The Engliſh privateers ſeldom find an opportunity in the preſent war, of taking merchant veſſels belonging to France, for with the exception of mere coaſting, which cannot be interrupted by privateers, the only remaining maritime trade of that country is carried on by means of neutrals. On the other ſide, the French privateers, notwithſtanding the incredible activity of the Engliſh commerce, are ſeldom able to take merchant ſhips of that nation, ſince the Britiſh government has thought fit that they ſhould not ſail without convoy.

According to this ſtatement, it is clear that if the neutral powers ſhould ſeriouſly unite to prevent prizes made on their ſubjects, privateering (*la courſe en mer*) would ceaſe by degrees. During the American war, the armed neutrality produced this effect, at leaſt in part. The ſame conſequence would have followed in the preſent war, if Ruſſia and the United States had purſued the ſame conduct as Denmark and Sweden. The horror inſpired by French revolutionary principles, has probably prevented that determination;

mination; it is that which has, at leaſt, induced the United States to conclude a treaty very diſadvantageous for their flag with England. But in the next war of an ordinary nature, theſe principles on the liberty of maritime commerce will be no doubt ſupported by all the neutral powers, and then will arrive the æra of the entire abolition of the courſe which the Judge of the Engliſh Admiralty ſeems ſo much to dread. Thus the world will be indebted for this amelioration in maritime war, to an enlightened policy, ſtill more than to a love of humanity.*

I have hitherto undertaken to prove, that maritime prizes in general, even tho' they ſhould confine themſelves to veſſels alone belonging to ſubjects of belligerent powers, cannot be reconciled either with juſtice or ſound policy. But ſuppoſing them legal, it would not thence follow that the privateers of belligerent nations would be authorized to detain, bring in, and afterwards proſecute to condemnati-

* Memoirs of JEAN DE WITT, 3d Ratiſbon edition, 1709, p. 168.---MABLY's Public Law of Europe, with the remarks of ROUSSET, at Amſterdam and at Leipzig, 1761, vol. ii. chap. 12. p. 322---332. Eſſays upon various ſubjects relative to Navigation and Commerce during War, by M. de STECK, Berlin, 1794, p. 58---61.

on in their Courts of Admiralty, the veſſels of a ſtate truly neutral. It is a neceſſary conſequence of neutrality, that the power which obſerves it, has a right to require that its commerce ſhould enjoy the ſame liberty in time of war as during peace, and that its merchants ſhould be able to ſend their veſſels, laden with the produce of their own country, or with foreign productions, and even merchandize deſtined for the uſe of war, in freight or on their own account, as often to the one as to the other of the belligerent powers.

For the purpoſe of weakening this pretenſion, the Judge of the Admiralty relies, *in part*, upon this, that the right of war is unlimited; *alſo*, that property belonging to an enemy may be taken wherever it can be found, and conſequently on board neutral veſſels; and, *in fine*, upon this, that the neutrals which carry to an enemy, merchandiſes contraband in war (*contrebande de guerre*,) breaking by that very act, their neutrality, the belligerent powers are, by the right of war, authorized to reſtrain them.

The *firſt* allegation proves nothing; for there does not exiſt *a right of war* but againſt

againſt *the enemy*, and not againſt *neutrals*, with reſpect to whom, ſeeing that they live in peace, war ought to be conſidered as not exiſting; and ſuppoſing that the right of war admits no limits with reſpect to the enemy, this ought to be underſtood only of the *quantity* of means, and not of their *quality*. For even the moſt barbarous nations conſider it flagrant baſeneſs to employ aſſaſſins or priſoners, and to break a capitulation once agreed upon, whatever advantage they might derive from ſuch conduct. And to confine ourſelves to the practice of civilized nations, are they not unanimous in repelling as cruelty, the act of killing, plundering, or merely ill-treating people without arms?

The *ſecond* allegation is too general; for before we acknowledge the right *of ſeizing enemy's effects wherever they are found*, we muſt begin by reſtraining theſe words: *enemy's effects* (*effets enemis*,) to *public* property belonging to the belligerent power, which alone can be conſidered as enemy's, and not the effects belonging to the individuals, ſubjects of that power. It is for this reaſon, that it is permitted to levy contributions in a conquered country, which are afterwards regularly aſſeſſed upon the inhabitants; whilſt it

it is not permitted to plunder the latter, or arbitrarily ſeize their goods. The exerciſe of this right muſt moreover be confined to places where the belligerent powers can legally act in an hoſtile manner, as for example, on an enemy's territory, or upon the high ſeas; for it is clear that it cannot be exerciſed either upon neutral territory, or in places where an armed force could not act, without violating the deference and reſpect due to neutrality. We ſhall be told, perhaps, that the inviolability of the neutral territory is not hurt, when the privateer of a belligerent power ſeizes an enemy's cargo on board a neutral veſſel on the high ſea; ſeeing that as the ſea does not belong to any body, no power can claim a property in it. But though this may be true of the ſea itſelf, it cannot be denied that the veſſels which cover and traverſe it, ought to be conſidered as belonging to the ſovereign of the individual who has equipped them, and of the port from whence they are fitted out. This is not, on the part of ſuch ſovereign, a chimerical pretenſion; it is a real and inconteſtable right, a right acknowledged by all powers, and which cannot be refuſed on better grounds to neutral ſtates, with reſpect to the veſſels of their ſubjects employed in commerce,

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than to belligerent ſtates, with reſpect to thoſe of their ſubjects who fit out privateers. This right is rendered manifeſt by the order which the ſovereign gives to the commanders of his ſhips to carry his flag, by the rules which he preſcribes to them, by the laws which he publiſhes reſpecting the conduct which they ought to purſue at ſea, and by the penalties to which thoſe who violate them are ſubjected. Were it otherwiſe, the crew, on leaving port, would return into the independence of a ſtate of nature; all ſubordination would ceaſe between them and their captain and the other officers: the moſt horrible crimes committed at ſea could not be with juſtice proſecuted and puniſhed on land; and as every veſſel would conſtitute in itſelf a little independent power, there would be thence as many of theſe powers as there are veſſels ſailing on the high ſea, which might at their pleaſure make war or conclude peace, without being accountable to any body. Theſe abſurdities are too palpable at firſt bluſh, and alſo too dangerous, for any man in his ſound ſenſes to deny that the neutral ſhip is under the ſovereignty of the neutral ſtate, and conſequently that this principle, *the neutral flag covers the property* (*le pavillon neutre couvre la merchandiſe*) is not at all arbitrary,

bitrary, but immediately derived from the nature of things, and the *natural* law of nations.

That this principle is equally ſanctioned by the *poſitive* Law of Nations, reſulting from treaties, is what I ſhall allow myſelf to demonſtrate here in a ſuccinct manner, ſince there are Engliſh lawyers, and among them the preſent Judge of the Admirality, who ſeem ſtill attached to the contrary opinion. The celebrated BUSCH has publiſhed a liſt of 35 commercial treaties, concluded between the year 1642 and 1780*, which are all favourable to this principle, while on the contrary, only two have been concluded in that interval, in which the principle, anciently eſtabliſhed by the *Conſolato del mare*, upon the liberty of ſeizing enemy's property on board neutral ſhips, has been followed. Theſe treaties, are thoſe which Great Britain concluded in 1661 with Denmark, and in 1670 with Sweden. We find beſides, ſome other treaties, in which the ſenſe is equivocal, relatively to this point. Since 1780 up to the preſent day, we can cite, at leaſt, 23 treaties, in which the prerogative of the neuteral flag has been

* See his book already cited, p. 47---52.

acknowledged,

acknowledged, as may be ſeen by the liſt annexed to this work. I know on the contrary, of only one treaty, that between Great Britain and the United States of America, which is founded on the oppoſite rule. Since then, the treaties by virtue of which the merchandise is covered by neutrality of the flag, form, in reſpect of the others, ſo conſiderable a majority, we ought lawfully to view them as containing the general rules, and the others only as an exception: from whence it reſults, that this rule, which is beſides founded, has been ſeen, upon the *natural* Laws of Nations, ought to be applied to ſtates with which contrary treaties do not exiſt. To apply to undetermined cases, as the Engliſh publiciſts do, this very ſmall number of treaties which reſpect the quality of the proprietor of the cargo, in preference to that of the ſhip, it is to ſubſtitute the exception of the rule, and conſequently ſtrip the general law of all ſound interpretation.

To appreciate ſtill better the pretenſion of the Engliſh, it is not impertinent to remark, that so early as about the middle of the 14th century, and at the time when the *Conſolato dél mare* was the only law in force, they eſtabliſhed by formal treaties,

ties, for the firſt time, the rights of the neutral flag, as may be ſeen by the treaties of EDWARD III. with the commercial cities of Spain in 1351, and afterwards with Lisbon and Oporto towards the middle of the 17th century. It is farther, England which firſt concluded a treaty conformable to this principle, that of 1642 with Portugal, renewed in 1654, the only one of the kind which, for various political reaſons, the Engliſh have ſtill conſidered as ſacred. It is from the æra of that treaty that a long ſeries of ſimilar acts commences, by which the inviolability of the neutral flag is acknowledged*, and of which ſeveral have been concluded by England herſelf, ſuch as thoſe with France in 1655, 1677, 1713, 1742, and the laſt of the 26th of September 1786, ſo remarkable for its very detailed determinations relative to the rights of a neutral flag; thoſe with the United Provinces in 1668 and 1674, and finally, the commercial treaties with the Porte and with the Barbary powers.

* So early as 1596. Queen ELIZABETH claimed the rights of a neutral flag, on the ſubject of the detention by the Dutch, of Engliſh veſſels, which had on board property belonging to ſome citizens of Antwerp, who were at that time ſubjects of Spain, and conſequently enemies of Holland. She obtained reparation for that which the Engliſh then called an *inſult*, by detaining four Dutch privateers. BUSCH, p. 145.

Notwithſtanding

Notwithſtanding theſe authorities, which are their own work, the Engliſh pretend that the powers of the north have endeavoured of late to give currency to the principle of the inviolability of the neutral flag, only to favour their own commerce; and in the embarraſſment in which they find themſelves, ſometimes they invoke the *Conſolato del mare*, the work of a few little ſtates no longer in being,* as a fundamental and invariable law; ſometimes they have recourſe to the maritime ordinances of certain powers, as if the particular regulations of any ſtate whatever could annihilate treaties; ſometimes, in fine, they rely upon the ſuffrage of GROTIUS, and of ſome other ancient lawyers, whoſe ſuperannuated ſyſtems had their birth before 1642, the æra ſince which the rights of neutral flags have began to obtain favour. Among the moderns, the only authority which they cite is VATTEL; yet is he ſo indeciſive, and ſo manifeſtly contradictory,

* It is known, beſides, with reſpect to this pretended *fundamental and invariable law*, which the Engliſh invoke, that they do not deign to conform to it even in the caſes in which they inſiſt upon its validity, as they never pay to the owners of neutral ſhips, the freight which they would be entitled to according to this law. How can we perceive a ſtable principle in the midſt of theſe irregularities?

that upon this point he has no right to the praiſes which his work has, in other reſpects, juſtly acquired to him. If the queſtion ought not to be decided according to principles founded upon reaſon, and upon treaties, but according to the authority of the publiciſts, we might oppoſe to thoſe cited by the Engliſh, a HUBNER, a De STECK, a GALLIANI, a LAMPREDI, a HENNIGS, a BUSCH, a MARTENS; who in their works, full of complete reaſoning on this matter, and though belonging to different countries, have unanimouſly pleaded the cauſe of neutrals.

As to the *third* allegation, which founds the reſtrictions put upon the maritime commerce of neutrals, upon the right of belligerent powers to prevent the importation to the enemy, of merchandizes known by the name of *contrebande de guerre*, (contraband in war) I ſhall obſerve at the outſet, that this reſtriction, though founded upon the *conventional* law of nations now in force, is not, however, conformable with the *natural* Law of Nations.

VATTEL pretends, it is true, that in a maritime war, the neutrality is broken by the act of furniſhing the enemy with ſuch merchandizes, although he admits it

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ſuffers no injury in a continental war from a commerce of the ſame kind ; nor even by a treaty of ſubſidy. It does not appear, however, that a neutral power ſhews more partiality in the one caſe than in the other : we cannot even ſay, that it ſhews any, in permitting ſuch a commerce, ſo long as it does not encourage its ſubjects to carry merchandize for the uſe of war to one of the belligerent powers, while it forbids it in reſpect to the other. In the mean time, it is evident that the prohibition to carry ſuch merchandizes in time of war, when even it is reſtrained to articles of a uſe directly relative to the war, may cauſe a conſiderable loſs to the neutral ſtate, if its principal commerce conſiſts, in time of peace, of merchandize of that kind; ſuch as powder, ſaltpetre, brimſtone, firelocks, cannon, &c. This ought to induce all the ſtates to ſupport, even in this reſpect, the liberty of their commerce, and with much ſtronger reaſon ſtill, when they give to the denomination of *contraband in war*, ſo much latitude as the Engliſh do. The only limitation in the maritime commerce of neutrals, which ſeems to accord with the natural law of nations; is that which relates to the importation by ſea, of proviſions, of coined money, and of all arti-

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cles whatſoever for the uſe of war, into a city blockaded by ſea; becauſe, without that limitation, the object of the blockade would be defeated. Anciently, they confined themſelves to the prohibition of neutral veſſels found in this ſituation, from entering into the port; ſometimes alſo, their cargoes were purchaſed by the beſiegers, which ought always to be done, in ſtrict juſtice, when it is proved that the neutral veſſel was ignorant of the blockade.* I ſhall have hereafter occaſion to examine more in detail, what is conſidered as *contraband in war* by the *poſitive* law of nations, and that, in examining the *ſecond principle* of the judgment, where the queſtion preſents itſelf, whether the Swediſh veſſels detained can be lawfully regarded as being within the caſe.

Although I maintain that the maritime prizes made on enemies, and for a ſtron-

* The principles developed in this place, relative to the illegality of maritime prizes made of neutrals, according to the natural law of nations, deſerve to be compared *with the works entitled---Eſſay upon the Liberty of the Navigation and Commerce of Neutrals during the War, by* TOTZE, 1780, ſect. v. p. 31, &c. tranſlated into German under the title---Die Freyheit der Schiffahrt; Leipzig, 1780, 5ter Abſch, p 27--36. Eſſays upon various ſubjects, relative to the Navigation, &c. by M. de STECK, chap. xviii. p. 117--127.

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ger reaſon, upon neutrals, are contrary to the *natural law of nations*, I admit, however, that they are founded upon the *poſitive law of nations*, as well upon that which reſults from *cuſtoms and uſages*, as upon that which is purely *conventional*, and ſupported by treaties. This difference in the foundations upon which the legality of prizes may reſt, is important to obſerve, as often as the queſtion relates to a diſpute ariſen upon this matter between a belligerent power and a neutral power. For if it be ſhewn that the right of viſiting, and in certain caſes, of detaining and having neutral veſſels condemned as fair prize, is purely *conventional*, it thence clearly reſults, that the belligerent power cannot give to it greater latitude than the neutral power has conſented to allow, and that in all doubtful caſes, the conſtruction ought to be in favour of the neutral ſtate, according to the rule of law: *non plus datum quam conceſſum.*

The neutral powers, even thoſe who appear moſt jealous of the rights of their flag, have conſented that the ſhips of war and cruizers of belligerent powers ſhould viſit ſuch of their merchant veſſels as they meet at ſea; 1ſt, to verify whether the veſſel be really *neutral*,

tral, ſeeing that, as by a very common abuſe, merchant veſſels often carry a foreign flag, this ſign is become very uncertain in practice; and 2dly, to ſatisfy themſelves that it is not laden with merchandize prohibited by the law of war.

But in granting to the belligerent powers ſuch right of viſiting and ſearching, and in impoſing upon their commercial ſubjects the obligation of ſubmitting to it, the neutral powers have confined it within certain fixed limits, which the belligerent powers cannot lawfully overleap. By the treaties, this right has been granted only relatively to merchant veſſels which ſail *alone*, but not relatively to ſhips of war, or merchant veſſels which are *under* their *convoy*. The mode in which the viſiting ought to be made, is in like manner determined in them with the greateſt preciſion; the armed veſſel muſt keep beyond the reach of cannon-ſhot, and ſend on board the merchant veſſel a boat, in which, excluſive of the perſons neceſſary for managing it, there ought to be only the Captain or another officer, the Secretary, and a third perſon at the moſt. The object of this inquiry is, to examine the papers; and if they are found regular, the inquiry

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ought not to extend to the cargo. In no caſe ought the viſitors to break open cheſts, or commit the leaſt violence, under very ſevere penalties.

SECOND PROPOSITION.

We are come now to the ſecond propoſition of Sir WILLIAM SCOTT, by which he pretends, that the Sovereingn of a neutral ſtate cannot deprive the cruizers of a belligerent power of the right of viſiting, by cauſing their merchant veſſels to be eſcorted by ſhips of war; it is partly upon it that he maintains his concluſion, by which he pronounces the Swediſh convoy liable to confiſcation.

I think I have proved that the ſyſtem of cruizers and privateers, and the right of viſiting merchant veſſels, which conſtitutes part of it, being purely *conventional*, cannot admit any arbitrary extenſion; but nothing is more arbitrary, and conſequently more illegal, than the extenſion which is given to this right, in applying it to ſhips *which ſail under convoy*. All the treaties which ſpeak of viſitation at ſea, ſuppoſe that it has for its object merchant veſſels *not convoyed*; and among the great number of commercial treaties, of which a few

few only are unfavourable to the intereſts of neutral powers, we ſhall not find one which makes mention of this right relatively to veſſels eſcorted by ſhips of war.

Such a ſtipulation would be in fact abſurd. The power which ſhould put its hand to it, would conſent to its own ſhame: in granting to its ſubjects an eſcort for the protection of their commerce, it would leave them a prey to all the avarice of privateers; and to this baſeneſs, it would add that of making its own marine a ſilent witneſs of their inſults. As there can be no queſtion in the viſiting, but to know whether the merchant veſſels have not tranſgreſſed the laws relative to the commerce of neutrals, and that the benefit of convoy is not granted but to thoſe who are proved and recognized perfectly regular, it would acknowledge either its incompetence relatively to its own ſubjects, or, what would be more diſgraceful ſtill, that it does not merit any confidence in its public conduct.

Sir WILLIAM alledges, that it is only by viſiting and ſearching, that belligerent powers can ſatisfy themſeves the neutral veſſels are not engaged in illegal commerce. Allowing that this may be true of

ſhips

ſhips *not convoyed*, nothing thence reſults relatively to thoſe which are under *eſcort*, ſeeing that the eſcort is by its nature a ſolmen teſtimony given by the neutral power, to the legality of the commerce in which the ſhips are engaged, which it judges proper to take thus under its ſpecial protection: a teſtimony which is the reſult of proceedings taken before the veſſels leave port, and of inquiries ſo exact, that the merchants engaged in illicit trade are obliged to let their veſſels ſet out at their risk and peril, without being able to be admitted to convoy.

It has been ſeen, that according to the treaties, the right of viſiting veſſels not under convoy, extends only to the examination of their papers; and that, if they are regular, the privateers are forbidden to viſit the cargo. But as in this caſe, the belligerent power has not in favour of the legitimacy of thoſe papers, any other warranty than the *public faith* in the name of which they are delivered, would it not be contradictory to admit as ſufficient, the declaration of the neutral ſtate, in the caſe of a veſſel *not eſcorted*; and not to regard it as ſuſpected, when, by the preſence of the eſcort, and the teſtimony of the officer who immediately repreſents the ſovereign, it has acquired the moſt

impoſing character of which ſuch acts are ſuſceptible?

If the accuſation, and even the mere ſuſpicion of advancing a falſehood, of committing or favouring a fraud, be ſerious inſults between individuals, ſhall ſuch proceedings be admitted, or without any conſequence, from ſtate to ſtate? From this circumſtance alone, that two ſtates are at peace, does it not reſult on the contrary, that for all which is within their reſpective competence, they ought to acquieſce reciprocally in their declarations, clothed in the form required to render them authentic? To declare publicly, doubts of the truth of ſuch declarations, is to attack the honour, to violate the right of the power from which they emanate. To make theſe doubts a foundation for violating its juriſdiction with force, is an act of hoſtility which, though even it ſhould not be followed by war, cannot but leave remembrances both with that power, and all others who find themſelves by the act menaced with the ſame violence.

To give to his pretenſions on this point a colour of juſtice and regularity, the Engliſh Judge declares that a ſimilar proceeding would be perfectly legal on the part

part of Sweden towards England, ſhould the latter remain neutral in a war to which Sweden ſhould be a party. But until this opinion of an individual, however reſpectable in other reſpects, has been corroborated by public facts, thoſe who know to what a degree the Engliſh are ſuſceptible in the point of honour, and particularly when their flag is concerned, will think themſelves authorized to entertain ſome doubts on the ſubject; for during the ſmall number of wars in which England has not been a party, ſhe has conſtantly acted in favour of the commerce of her ſubjects, according to the very principles which ſhe now refuſes to neutrals, and has diſplayed as much vigour and zeal to *ſupport* the liberty of the neutral flag, as ſhe now uſes to *annihilate* it.

If we conſult the very inſtructions given to their cruizers by the belligerent powers, however contrary they may be in general to the letter of treaties, and the *natural* law of nations, we ſhall ſee in them a new and very ſtrong proof, that by the *common* (*contumier*) law of nations, neutral veſſels ſailing *under convoy*, are no more liable to viſitation, than by the *convential* Law of Nations. For to the preſent

ſent time no power has thought itſelf authoriſed to extend to themſelves that obligation. England herſelf, who in the preſent war has given to her cruiſers more extenſive powers than in preceding wars, has not compriſed in them that of viſiting ſhips *under convoy*. This clearly appears from the judgment itſelf, where it ſays, that upon the anſwer of the Swediſh frigate, *Captain* LAWFORD *having entertained doubts on the conduct which he ought to purſue in ſo delicate a ſituation, diſpatched a meſſenger to the Lords of the Admiralty, for their inſtructions*; a precaution which, ſeeing the extreme ſuperiority of his force, would have been evidently ſuperfluous, if his inſtructions had authorized him to viſit veſſels under eſcort. That the Admiralty ordered the ſeizure and detention of the convoy, makes no change in the buſineſs; for according to the judge's own acknowledgement, the ſole effect of that order is, to diſcharge the Engliſh commander of all perſonal reſponſibility, without legitimating by it, the attack which reſults from it, upon a neutral ſtate, if, in its principle, this detention were legitimate.

Although every perſon who claims a right, is bound to eſtabliſh proof of it, (*affirmanti*

(*affirmanti non neganti incumbit probatio*) particularly when the queſtion is that of a right, new, and which has not yet been exerciſed, Sir WILLIAM has not been able to alledge any treaty, any law either of his own country, or foreign, which authorizes the viſiting of veſſels *under convoy*. It has not been more poſſible for him, to cite among the great number of writers who have treated on this part of the law of nations, a ſingle authority that juſtifies it. He has been full as little capable of defending its juſtice by principles founded upon reaſon. For want of ſolid arguments he has had recourſe to vague and inſignificant declamations. I have, on the contrary, demonſtrated by direct and inconteſtable arguments, that ſuch a right cannot belong to belligerent powers. However, without in any manner confining myſelf to them, I proceed to render this truth more evident ſtill, by producing preciſe treaties, as well as laws and declarations, and citing ſeveral authorities of the greateſt weight.

The only maritime law, within my knowledge, that contains a poſitive determination upon this point, is that of King CHRISTIAN V. of Denmark, which may be found in the fourth book, chap. vii.

vii. art. 2. of this code. It ſtates, « that « in caſe when, from the fear of priva- « teers, or other unfortunate accidents, « any veſſels belonging to ſubjects of his « majeſty ſhould join to ſail together, if « there ſhould be found among them any « veſſel in a ſtate to be fitted for military « ſervice, it ought to carry the royal flag, « protect the reſt, *and not ſuffer* foreign « veſſels to board, viſit, or ſee its papers, « under any pretence whatever; but on « the contrary, to keep them at the great- « eſt diſtance poſſible, in which the other « veſſels ſailing with it ought to aſſiſt it « with all their power; and if any fo- « reign veſſel ſhould attempt to compel « it by force to ſuch viſitation, it ought « *to oppoſe itſelf to it with all its power*, « and not permit any thing that amounts « to an attack upon the majeſty of the « king, or upon his ſubjects. If any « perſon acts differently, and does not « put himſelf in a ſtate of defence when « he can do ſo, he ſhall be puniſhed ac- « cording to the ordinance of the ma- « rine.* If the fault ſhould proceed from

* The ordinance of marine here mentioned is no doubt that of the 27th of March, 1688, though publiſhed after the code: the articles 112, 115, 124, impoſe infamy, and forfeiture of life and goods, upon the officers.

« any

« any of the crew, who ſhould not have « done their duty on ſuch an occaſion, « proceedings ſhall be taken in the ſame « manner, with reſpect to them, accord- « ing to the ordinance of the marine.*" Our legiſlators have, conſequently, already, in the laſt century, impoſed on merchant vessels *the obligation of not ſuffering any viſitation*, when they ſail together, and that one can be found among them which may be armed and authorized to carry the royal flag : and this, as much for the honour of the flag itſelf, as to prevent any injury being done to the ſubjects of the king : from whence it is eaſy to infer, what was the opinion of the legiſlature with reſpect to vessels ſailing under the eſcort of a ſhip of war.

It may, in truth, be matter of doubt, whether the refuſal of vessels ſailing together to ſubmit to be viſited, be founded upon the law of nations ; ſeeing that the mere atteſtation of the regularity of the vessels, and of their cargoes, given by

* The ordinance cited, inflicts in § 12, corporal puniſhment or death, upon thoſe who ſhall not defend themſelves as they ought; and in the § 110, the pain of death upon thoſe who do not put themſelves in a ſtate of defence, or who abandon their poſt : it is the ordinance of the 8th of January, 1752, which is now in force, and which in certain reſpects is more lenient.

the

the captain of a merchant vessel, who is himſelf only a private individual, and beſides *an intereſted party*, cannot afford to privateers the ſame ſecurity as that of the captain of a man of war, acting according to the expreſs order of his government, which, after all the legal formalities have been obſerved, authorizes him to declare that all is regular. Thus, in ſanctioning in the former caſe a problematical right, the law has thereby confirmed in the latter, a right which, from its nature, was certain and determined.

The ſame article of this law proves, that the pretenſion of withdrawing neutrals from viſitation, by means of an eſcort of ſhips of war, has not began to manifeſt itſelf in our time; that it is, on the contrary, an ancient one, and that more latitude was given to it formerly than at preſent*.

Of all the treaties which contain ſtipulations relative to this object, the moſt

* We may, moreover, compare the diſpoſitive of this law with the ordinance of the 22d of September 1658, relative to merchant veſſels ſailing for America, the coaſt of Guinea, and the Mediterranean, at 16---18; which ſuppoſe the right of refuſing viſitation, and authorizes them to defend themſelves in ſuch ſituation.

ancient

ancient that I know, is the treaty of commerce between Denmark and Ruſſia, dated Peterſburgh the 8-19th of October 1782. The 18th article expreſſly imports, that in caſe where one of theſe ſtates ſhould find itſelf engaged in a war, the merchant veſſels of the neutral ſtate ſhall be ſubject to a legal viſitation; but if they ſhould be convoyed by one or more ſhips of war, *the ſimple declaration of the officer commanding the eſcort, that theſe veſſels do not carry any thing contraband*, ſhall be *perfectly ſufficient, and that there ſhall be no mention of viſitation**. The ſame ſtipulation will be found in the treaty of commerce between the States General of the

* See the collection of treaties by MARTENS, vol. ii. p. 292, where it is ſaid—"Suppoſing, nevertheleſs, that "ſuch merchant veſſels ſhould be eſcorted by one or more "ſhips of war, the ſimple declaration of the officer com-"manding the eſcort, that theſe veſſels do not carry any "thing contraband, ſhall be conſidered as fully ſufficient, "and no viſit ſhall take place." The 19th article ſtates: "As ſoon as it ſhall have appeared by the vouchers pro-"duced, or by the verbal aſſurance of the officer com-"manding the eſcort, that the merchant veſſels are not "laden with any thing contraband, they ſhall be at liberty "to continue their courſe without any further hinderance; "and thoſe ſhips of war, or privateers, of the one "part or the other, which ſhall, notwithſtanding, allow "themſelves to moleſt or endamage in any manner what-"ever, the ſhips in queſtion, ſhall be obliged to anſwer "for it in their perſons and properties, beſides the repa-"ration due for the inſult offered to the flag."

United Provinces and the United States of America, dated the Hague the 8th of October 1782, article 10;* and in that between Sweden and the United States of America dated Paris, 3d of April 1783, article 12.† We ſee ſimilar diſpoſitions in the treaty of commerce between Auſtria and Ruſſia, of the 1-12th of November 1785, article 13; as also in the declaration of the EMPEROR of GERMANY, and of the EMPRESS of RUSSIA, article 15;§ and finally, in the treaty of commerce between France and Ruſſia, dated St. Petersburgh the $\frac{31 \text{ December } 1786,}{11 \text{ January } 1787,}$ article 31; a treaty ſo much the more remarkable, as theſe two great maritime powers recite in them, as axioms, and confirm therein, four years after the concluſion of the American war, the principles admitted during that war by the armed neutrality.§ The treaty of

* "Collection of MARTENS, ſame vol. p. 254: dog zal "geen viſitatie van papiereu gevergt worden van cheepen "onder convoy der Oorlogſcheepen maar gelo o worden "gegeven aan het wourd van ded officier het convoy "leidende.,,

† MARTENS, vol ii. p 334: 'nevertheleſs, the exhi-'bition of the papers ſhall not be demanded of merchant 'ſhips under the convoy of veſſels of war but credit 'ſhall be given to the word of the officer commanding 'the convoy.'

§ MARTENS, *ibid.* p. 625—638.
‖ MARTENS, vol. iii. p. 17 and 18.

commerce

commerce between Ruſſia and Naples, of the 6-17th of January 1787, article 20, contains the ſame regulation; and adds thereto, in article 21, (what alſo appears in the treaty concluded with France) *that the cruizers which, after having received the verbal declaration of the chief, ſhall hinder the merchant veſſels from continuing their courſe, or moleſt them, ſhall anſwer the damage in their perſons and property; beſides the reparation due for having inſulted the flag.** A like diſpoſition is to be found in the treaty between Ruſſia and Portugal, of the 9-20th of December 1787, articles 25 and 26.†

If ſtipulations of this kind are not to be met, except in modern treaties, and not in ancient ones, it is becauſe anciently no belligerent power had conceived an idea of arrogating to itſelf a right of viſiting veſſels under convoy. But the pretenſions of the Engliſh, which are ever extending themſelves by reaſon of their maritime ſuperiority, not having, in our days, known limits in a greater degree, the other powers have at laſt ſeen themſelves forced, for the honour of their flag,

* Martens, vol. iii. p. 45.

† Martens, *ibid.* p 118, 119.

to

to make laws, and conclude treaties, which ſhould preſerve from all inſult the ſhips of war which they employ to protect the neutrality and the commerce of their ſubjects. The right eſtabliſhed by theſe laws, and by theſe treaties, is only the confirmation of an ancient uſage, which the neutral powers have never renounced. So early as in the year 1762, when the Dutch Captain DEDEL had repulſed by force the viſit which an Engliſh frigate attempted to make on the merchant veſſels which he convoyed, the States General approved his conduct in every point, and maintained its legality in an ordinance of the 20th of September of the ſame year, by which they prove that this conduct of the Captain was authorized by the uſage generally received among civilived nations.*

It is not only by the actual conduct of neutral powers, but by that of belligerent powers themſelves, that this usage is eſtabliſhed. Independently of treaties, the prohibition to viſit merchant veſſels ſailing under convoy, has been in all times tacitly compriſed in the inſtructions and regulations which the belligerent powers

* This ordinance is to be found in the Collection of VAN ZEE SAHEN, vol. ix. p. 207.

have

have publiſhed for their cruizers and privateers. It is to be found alſo ſometimes expreſsly ſtated in them. In the 6th article of an ordinance of the 26th of January 1781, which the States General publiſhed, on their taking part in the American war, it is expreſsly enjoined, that in caſe of meeting neutral veſſels ſailing under convoy, if the commanding officer declares that he is perfectly certain that the ſhips under convoy are not laden with articles contraband in war (*contrebande de guerre*), *credit ſhall be given to that declaration, and that in conſequence no viſit ſhall be required**. In the war which the Empreſs CATHERINE II. maintained, at firſt againſt the Turks alone, and afterwards againſt them and the Swedes jointly, ſhe conſtantly reſpected the ſacred principles of the Maritime Law of Nations, which ſhe had ſo ſolmnly maintained as a neutral power during the American war, without ſuffering herſelf to be diverted from them in any reſpect by the example of her enemy King GUSTAVUS III. who, as we have ſeen, allowed himſelf to make an

* See the extract of this ordinance publiſhed by order of the Daniſh College of Economy and Commerce, in the collection of ordinances of 1781, by HOPSNER; and the German tranſlation in the work intitled Hennings-Samm. lung von Staatſchriften warend des Seekriegs, von 1776--173, vol. ii. p. 292.

attack

attack upon them. The 13th article of her regulation for cruizers, given at Peterſburgh the 31ſt of December 1787, expreſsly ſtates, that when neutral merchant veſſels are convoyed by a ſhip of war of their nation, the Ruſſian ſhips of war ought not, in any manner, to addreſs themſelves to the merchant veſſels, but only to the commander of the eſcort; and that if he declares that there is not on board, any merchandize contraband in war, (*de contrebande de guerre*) they ought to be content with this declaration, without requiring viſitation.* We muſt obſerve here, that this diſpoſition is general; that it makes no diſtinction between the ſtates with which there are exiſting treaties, which, in this caſe, interdict viſitation, and the other neutral ſtates; or, to uſe the favourite expreſſion of the Engliſh, between *nations privileged* and *not privileged.*

* Collection of MARTENS vol. iv. p. 512: 'when 'neutral ſhips ſhall be eſcorted by a ſhip of war of their 'nation, the former ſhall not in any manner be touched, 'but the commander of the convoy muſt be addreſſed 'directly; and if he declares that the ſaid veſſel under 'his convoy have not on board any merchandize, *con-* '*traband in war*, the party inquiring ſhall be content 'with this declaration, without requiring that a viſit 'ſhould be made'

The

The Engliſh privateers never arrogated to themſelves ſuch a right of viſitation in ancient times, and they have done ſo but very rarely in modern times. I know but one inſtance of the kind in the European ſeas during the American war, and though it concerned only the Danes, it excited an univerſal ſenſation. Several Engliſh cruizers together inſiſted upon viſiting ſome Daniſh merchantmen convoyed by a frigate under the command of Captain SCHIONNING; the viſit having been refuſed, they had recourſe to force, and that officer having had the weakneſs to yield to it, he was caſhiered by a court-martial appointed for that purpoſe. In the Indian ſeas, the privateers which from one time to another, have attempted like illegalities, have been always repulſed as they deſerved. But, however illegal the conduct of the Engliſh privateers may have been upon more than one occaſion, it does not thence reſult, that the government has really approved it. During the preſent war, the Daniſh convoys have been always reſpected. There has been only one ſingle occaſion on which ſome Engliſh ſhips of war attempted to viſit the moſt diſtant veſſels of a numerous Daniſh merchant fleet, ſailing towards the Mediterranean under the eſcort of a frigate; but

but the Daniſh commander having complained of it, they declared that it was a miſtake; and Lord St. VINCENT gave him complete ſatisfaction; a proceeding which, in my opinion, adds not a little to the glory which this great Admiral has acquired himſelf by his brilliant exploits. The French, on their part, reſtored to the Daniſh commander, veſſels taken by their cruizers after they had been ſeparated by foul weather from their eſcort; and that, upon the declaration that theſe veſſels conſtituted part of his convoy. The buſineſs of the Swediſh convoy is the firſt caſe within my knowledge, in which a contrary conduct has been authorized by the Britiſh government, and in which the courts have undertaken to render it legal by a formal judgment. This is proved by the judgment, which does not cite any precedent, a circumſtance which the Engliſh Judges never fail to conſider as a ſufficient authority, although, in truth, the ſimple judgments pronounced in a preceding cauſe, cannot in the eye of reaſon be valid againſt foreign ſtates.

It is undoubtedly by reaſon of the novelty of this pretenſion to the right to viſit veſſels under convoy, that the principal publiciſts, ſuch as HUBNER, GALLIANI,

LIANI, LAMPREDI, STECK, whoſe works treat expreſſly of the rights of neutral commerce in time of war, have not touched this queſtion, but have ſimply confined themſelves to inquire the extent which they may lawfully give to the right of viſitation by cruizers which meet, on the high ſea, neutral ſhips not convoyed. The letter already cited of PUFFENDORF to GRONINGIUS*, ſhews, nevertheleſs, that he conſidered the neutral powers as authorized to convoy the merchant veſſels belonging to their ſubjects, when they were not laden with articles contraband in war (*de contrebande de guerre.*) From whence we may infer, that the ſhip of war charged to eſcort them, appeared to him founded in oppoſing itſelf to all viſitation, for otherwiſe the eſcort granted would have been without utility.

Of all the writers whom I know, MARTENS is the only one who has treated this queſtion, although in a very ſuccinct manner, and he expreſsly refuſes to privateers the right of viſiting merchant veſſels ſailing under eſcort. This authority, ſingle as it may be, is ſo much the

* See the above, p. 31.

more weighty, as that publiciſt has acquired the greateſt celebrity, by the extent of his information in every thing relative to the conventional law of nations, and as his impartiality cannot be ſuſpected by the Engliſh, ſeeing his quality of *Ordinary Profeſſor of the Law of Nations*, on the foundation of his BRITANNIC MAJESTY at the Univerſity of Gottingen.

THIRD PROPOSITION.

After having thus eſtabliſhed, that the right of viſitation cannot extend to veſſels under convoy, I proceed to the examination of the third propoſition of Sir WILLIAM SCOTT, ſtating that the penalty incurred by the refuſal to ſubmit to viſitation, if accompanied with violence, is the confiſcation of the property attempted to be withdrawn from it. For this purpoſe I ſhall prove:

1ſt, That this propoſition, conſidered in its full extent, can be hardly juſt, when even the queſtion ſhould only relate to veſſels not convoyed.

2dly, That it is abſolutely falſe, if the queſtion relates, as in the preſent caſe, to veſſels

veſſels ſailing under the eſcort of a ſhip of war.

3dly, Finally, that ſuppoſing even that this propoſition were juſt, abſtractedly ſpeaking, it cannot be applied to the preſent caſe, conſidering the particular nature of the circumſtances of the fact.

I. The arguments of the Judge of the Admiralty are drawn from a paſſage of VATTEL; from an ordinance of the *French marine* of 1684, with comments by VALIN; from an ordinance of the *Spaniſh marine* of 1718; from an order iſſued in 1664, by the *Privy Council of England*; from an *Engliſh proclamation* of 1672.

VATTEL ſays, « It is impoſſible to pre-
« vent the importation of contraband
« goods, if neutral veſſels, met at ſea, are
« not viſited: there is a right, therefore,
« of viſiting them. Some powerful na-
« tions have refuſed, at different times,
« to ſubmit to this viſitation. *At this day*,
« a neutral veſſel *which ſhould refuſe to*
« *ſuffer the viſit*, would ſubject itſelf, by
« that alone, to be condemned as being a
« lawful prize.*"

* The Law of Nations, by M. de VATTEL, book iii. chap. vii. § 114.

We

We muſt obſerve, in the firſt place, that VATTEL, ſpeaking manifeſtly here, only of the refuſal immediately given by a neutral merchant veſſel to ſuffer the viſit, and not of the oppoſition which, according to the expreſs orders of its ſovereign, a ſhip of war may make to the viſiting of the ſhips which it eſcorts, his deciſion applies only to veſſels *not convoyed*, and not at all to thoſe which are. We ſee, moreover, by this phraſe, *at this day*, that the queſtion here does not relate to a *natural Law of Nations*, but to that which VATTEL eſteems to be admitted by treaties, and *the uſage of modern times*. And in fact, we have already ſhewn, that the obligation to ſuffer the viſit, is not founded upon the *natural law*, but ſimply upon *general cuſtoms* and *conventions*. We underſtand, that in caſe of oppoſition to the viſit, force may be lawfully employed, and that then the owner, the captain, and the crew, having to impute to themſelves alone the damage which they draw upon themſelves, the ſhip, or the cargo, in putting themſelves on their defence, they cannot conſequently require reparation for it. So far as that, the right of the privateer appears ſufficiently founded; but as there is not any treaty of commerce which impoſes the *penalty of confiſcation* upon

upon the veſſel, the captain of which ſhould defend himſelf, it ſeems to me that neither the belligerent power, nor its courts, are authorized to pronunce it.*

To eſtabliſh the legitimacy of this penalty, neither ordinances of marine, nor regulations publiſhed for privateers, can be cited, ſeeing that theſe only amount to the particular laws of the ſtate which makes them, and which conſequently cannot bind the ſubjects of a foreign and independent ſtate. If we conſider the multiplicity of ſevere and revolting abuſes which are found in practice, connected with the general ſyſtem of privateering, we ſhall feel how very unjuſt it would be to ſubject to ſo hard a penalty, thoſe who, from the dread of theſe abuſes, equally frequent and irremidable, reſiſt the viſit.

* At the end of the judgment of the Court of Admiralty, will be found a note, of a deciſion given by the *grands juges*, (chief juſtices) who have cognizance in the *dernier reſſort*, of matters relative to maritime inſurances, of which the author had no knowledge until after the printing of the original Daniſh, and which ſhews, that in the eyes of the organs of the Engliſh law, the viſit is not a *legal act*, but a ſimple *act of force, which the party has a right to resist when he can.* This deciſion contraſts ſo manifeſtly with the principles of Sir WILLIAM SCOTT, that it alone furniſhes the moſt complete refutation of them.

Without

Without ſpeaking of the Barbary pirates, and the other depredators of the ſea, who are in the practice of hoiſting the flag of a belligerent power for the purpoſe of boarding merchant veſſels, and poſſeſſing themſelves of them in their viſit, it is known that another species of pirates commonly called privateers (*corsaires*) ſeldom diſtinguiſh themſelves by their reſpect for the treaties and regulations of their ſovereigns. Without regard for the ſanctions which limit to three perſons (the number of people charged with the viſit, and which reſtrain it to the ſimple examination of papers), we ſee theſe frequently throw themſelves in a crowd, and armed, into peaceable neutral veſſels; endeavour to impoſe upon the the captain and the crew by abuſe and menaces; and if they cannot by theſe means obtain a confeſſion which authorizes the ſeizure, to uſe them ill perſonally. Under pretence of ſearching for concealed papers, ſome even among the moſt moderate, exerciſe upon all parts of the veſſel the moſt revolting inquiſition: they frequently force open chests and bales: when they do not find any cauſe of ſuſpicion, they exact from the captain conſiderable preſents in money or in merchandize: others take by force whatever they think proper;

proper*; and to fill up the meaſure, they even go ſo far as to carry off the ſtouteſt men of the crew, to reinforce their own; ſo that in caſe of accident or ſtorm, thoſe who remain, being inſufficient for the management of the veſſel, are expoſed to periſh. Often, in fine, upon the ſlighteſt pretence, and in the hope of afterwards corruptly obtaining from ſome of the ſailors declarations in their favour, they carry off the veſſel, and bring her into port, where ſhe remains, ſometimes, for years, before the owners of the ſhip or of the cargo, are able to procure a hearing.†

* We can, upon this point, refer to the teſtimony of VALIN, a very great defender of privateers and cruizers, who in his commentary on the ordinance of marine of LOUIS XIV. book iii. tit. ix. art. 13. (vol. ii. p. 251.) ſpeaking of the *pain of death* enacted by that ordinance, againſt every privateer who takes, or ſuffers to be taken, any thing on board the veſſel which he viſits, thus expreſſes himſelf: "This puniſhment, in truth, may appear "rigorous in certain caſes, but the natural propenſity "of privateers *(corſaires)* to plunder, has made it be "thought, that it was neceſſary to reſtrain it on theſe "occaſions by the ſeverity of the puniſhment."

† I am aſſured that the Court of Admiralty of London, pronounced judgment only in 1799, in a caſe relative to a veſſel ſeized during the ſeven years war. The Profeſſor BUSCH, in his Nachtzag zu ſeiner Abhandlung uber die Zerruttung des Seehandels, Hamb. 1794, cites another caſe of the ſame nature, commenced in January 1781, and which was not finiſhed at the time when his was written.

Fortunate

Fortunate owners ſtill, if even then they could flatter themſelves with obtaining the juſtice which they ſolicit! But by a ſtrange caprice peculiar to the courts eſtabliſhed for taking cognizance of the validity of prizes, it is there laid down in the firſt inſtance as a principle, that the ſhip and cargo, once ſeized, are ſubject to confiſcation, and inſtead of impoſing on the *plunderers* (*spoliateurs*) the obligation of juſtifying the legality of the ſeizure, they are the *plundered* (*spolies*) on the contrary, who muſt prove that it is ill-founded. To this diſadvantage, ſo oppreſſive for the moſt legitimate claims, is joined another not leſs, that is, that the nature of the proofs required from the complainants, is not previouſly fixed by any poſitive known law; and that in every point they exceed what the natural law of nations would require. Theſe are particular and private rules, dictated by the momentary intereſt of the belligerent power, and which vary according to circumſtances.* Let us ſuppoſe in fine, that after

* England, for example, has not abſolutely, any ſettled law relative to maritime prizes. This defect obliges the Judges to create arbitrary rules, which change according to circumſtances, ſo much the more ſo, as they are, beſides, bound to follow the letter of the law; for thoſe who are uſed to walk always in leading ſtrings, have

after a long and expenſive proceſs, the claim ſhould be allowed, ſeldom do the owners obtain the reimburſement of their expences; and more ſeldom ſtill, an indemnity proportioned to the loſs of precious time; and to that which reſults from the deterioration of the veſſel or merchandizes, from the diſperſion of the crew, from the fall of prices, and other changes which happen in commercial affairs. After ſuch an expoſition, founded upon facts, unfortunately too notorious, can we blame the reſiſtance which the neutrals make to a right, which in its exerciſe ſo often aſſumes the character of robbery? And will it not be found, on the contrary, that in ſuch caſe confiscation would be an uujuſt penalty, and in every point diſproportioned to the offence?

If to juſtify the confiscation, it be alledged that it is the only poſſible mode

have their ſtep leſs firm. Although the foreign ſtates have often and loudly complained, that the Engliſh tribunals do not conform to treaties, and that in general they do not follow fixed laws, government has not to the preſent time taken any meaſure to remedy this evil, by acts of parliament. It is pretended that this is a matter of policy; but it will be allowed at leaſt, that this is not a free and liberal policy. See BUSCH, in the book already cited, p. 78—84.

of maintaining the right of viſitation, it will nevertheleſs be clear, that it ought not, in this caſe, to extend but to thoſe who refuſe it; that conſequently, *the veſſel only ſhould be liable to confiſcation*, ſeeing that the owner ought to anſwer for the acts of the captain, who is his agent; but that the *cargo* cannot be in this ſituation, unleſs it belongs to the captain, or to the owner of the veſſel, or that it ſhould be enemy's property. For by what principle of juſtice can it be made a crime in the freighter, that the captain has reſiſted viſitation, unleſs it be clearly proved that it was at his requeſt? Upon this point HUBNER is entirely of my opinion; and VATTEL ſays alſo, ſimply, that in caſe of reſiſtance, *the veſſel is at this day liable to confiſcation*; but he does not ſay a word of the *cargo*.

Sir WILLIAM finds fault with VATTEL, for having ſpoken of confiſcation as of a law *purely modern*. « When it is remem-
« bered," ſays he, « that it is a principle
« not only of the civil law, (on which
« great part of the law of nations is foun-
« ded,) but the private juriſprudence of
« moſt countries in Europe, that a contu-
« macious refuſal to ſubmit to fair inqui-
« ry infers all the penalties of convicted
« guilt."

« guilt." Reaſoning evidently forced, as the principle of which Sir WILLIAM ſpeaks, relates only to affairs of ordinary juriſdictions, where the defendant is legally cited before a tribunal to which he owes obedience. We muſt find an extreme want of means to apply, as he does, this ſame principle to a diſpute ariſen on the high ſea, that is to ſay, at a place over which no ſtate has a right of ſovereignty; between perſons who obey ſovereigns different and independent of each other; and at a time when it would be abſurd to ſuppoſe that they could have there a regular citation or a competent tribunal.

The Judge of the Admiralty further relies upon the 12th article of the ordinance of the French marine, promulgated in 1681, which states, that *every veſſel ought to be conſidered good prize, in caſe of reſiſtance and combat*; ſince he adds, according to the commentary of VALIN, page 81, the *reſiſtance alone* is ſufficient for the confiſcation of the veſſel: and he refers to the Spaniſh ordinance of the year 1718, which uſes the disjunctive particle *or*, inſtead of the conjunctive *and*, in caſe of *reſiſtance or combat*.

I ſhall obſerve in the outſet, that in the *Commentary* of VALIN, which I have

now

now under my eyes, the Spaniſh ordinance is truly mentioned, but without adding to it that remark*. Sir WILLIAM does not put ſo great a value, in this point, upon this aſſertion, but becauſe he pretends to be able thence to conclude, that the *menace alone of fighting*, was ſufficient in the caſe of the Swediſh convoy, to juſtify the *confiſcation*. But this interpretation is evidently contrary to the article which he cites, taken in its whole extent. « Every veſſel (theſe are his own « terms) which *ſhall refuſe to ſtrike its* « *ſails*, after it ſhall have been ſummon- « ed by our veſſels, or by thoſe of our « ſubjects, armed for war, *may be forced* « *to do it by the artillery*, or otherwiſe : *in* « *caſe of reſiſtance* and *combat*, it ſhall be « good prize." Theſe expreſſions clearly ſhew, that it is not the *mere refuſal of the viſit*, or the *menace of making reſiſtance*, that is the caſe foreſeen by the law, but *a real and active reſiſtance*. This is alſo the manner in which VALIN explains it

* The quotation of the page is alſo inaccurate, for this matter is not treated in p. 81, but in the ſecond volume, p. 269—271, of the Rochelle edition of 1771. Perhaps Sir WILLIAM means to ſpeak of the *treaty of prizes*, by the ſame author, which I have not been able to procure : although this would be his *Commentary upon the Ordinance of the Marine*, which he has cited in the judgment.

in

in his Commentary: « If the captain of « the veſſel (ſays he) obſtinately engages « in combat, rather than ſtrike his ſails, « and that the veſſel ſhould be taken, it « ſhall be conſidered as good prize; be- « ſides the perſonal puniſhment which « may be inflicted upon him, if he be a « Frenchman, particularly if he has re- « ſiſted a King's ſhip." According to the remark of VALIN upon the follow- ing article, if he ſtrikes his ſails, and re- fuſes only to produce his papers, this pu- niſhment does not take place, but the veſſel ought only in that caſe to be carri- ed into the neareſt French port, there to be legally viſited. We muſt not think, from the expreſſion *every veſſel*, that this law extends to all veſſels without excep- tion. The ſequel of the article ſhews, that it only relates to ſhips not eſcorted. A general expreſſion has been choſen, to make it be ſeen that the *French ſhips* are comprized in it, as the *neutrals*. This is what VALIN himſelf obſerves. We know, moreover, that a ſentiment of juſtice and humanity determined LOUIS XVI. during the American war, to aboliſh this ordi- nance, in every thing that relates to mari- time prizes, and it has not been without exciting an univerſal diſcontent, that the French have reſtored it in force in the pre- ſent war.

We

We cannot then be sufficiently astonished at the kind of satisfaction with which Sir WILLIAM cites this ordinance, particularly if we observe, that notwithstanding all its severity, it is much more moderate still than his judgement; for it speaks only of merchant vessels *not convoyed*, and of a resistance sufficiently obstinate to require the using of an armed force; instead of which, the judge extends the confiscation which he pronounces, even to convoyed vessels, and considers a verbal refusal to suffer themselves to be visited, accompanied by menaces of resistance, as equivalent to an effective resistance. Finally, the French law confiscates only the vessel, and the English judge adds to it the entire cargo.

The same observations apply to the Spanish ordinance, which is copied from that of France. I am not able to decide positively, whether it be now followed in Spain, as pretended in the judgement. At least it is certain, that this power has testified in the present war all possible respect for the neutral flag. The merchants have had frequently cause to complain of French and English privateers, but not of Spanish.

Finally, mention is made in the judgment, of two English orders, or proclamations,

tions, of 1664 and 1672, peculiar, from their nature, to the war which was their object, and which, having none of the characters that conſtitute permanent laws, cannot, at the diſcretion of a judge, be extended to the preſent war: an extenſion which would be, beſides, ſo much the leſs proper, as the judge himſelf acknowleges that ſeveral articles of theſe orders were at the very time of their publication generally diſapproved, as of unheard and extraordinary ſeverity. He thinks indeed, that we ought to except from this cenſure, the article on which he relies in the preſent buſineſs: but nothing ſpeaks in favour of this exception but his own ſingle opinion. He even ſays, that upon ſeveral occaſions it had not been obſerved, which proves clearly enough, that the English government had found it too harſh. To give a new and obligatory force to a temporary penal regulation, to a regulation ſuperannuated and fallen for above a century into diſuſe, is not only, on the part of the judge, a legiſlative act which exceeds his competence, but a manifeſt injuſtice, and ſo much the greater as the queſtion to which it relates is that of a penalty which goes to no leſs than the total ruin of the parties intereſted. In fact, in this reſpect the article cited is much more rigorous than the

French

French and Spaniſh ordinances, as it declares the cargo good prize as well as the veſſel; but like theſe two ordinances, it relates only to *a veſſel not convoyed*, and ſolely in the caſe where it *ſhall fight or make reſiſtance.*

II. Admitting for a moment, that the leaſt reſiſtance to the viſit puts the merchant veſſel in the ſituation of being confiſcated, it cannot thence reſult, that this penalty ſhould extend to veſſels under eſcort. It has been ſhewn, that it is a rule founded upon the conventional law of nations now in force, that merchant veſſels convoyed by ſhips of war, are not ſubject to viſit*; that no treaty†, no maritime law§, none of the inſtructions publiſhed for cruizers, even in England¶, authorizes it;--that the cruizers which meet ſuch veſſels, ought to be ſatisfied if the officer commanding them gives his aſſurance that none of the veſſels which he eſcorts, is engaged in illicit commerce; and that after ſuch an aſſurance, the cruizers ought to abſtain from all viſit, and permit the convoy to purſue its courſe without any interruption. From this principle it reſults, that the refuſal made, whether by the

* See page 77. † See page 77.
§ See page 81. ¶ See page 86.

commander

commander of the convoy, or by the veſſels convoyed, of ſuffering viſitation, is not the *violation*, but the *exerciſe* of a legitimate right; and that, far from this refuſal expoſing theſe veſſels to *confiſcation*, it is, on the contrary, the attempt to viſit veſſels *ſailing under the ſafeguard and the immediate reſponſibility of a ſovereign ſtate*, that is an outrage of which that *ſovereign* would be certain to obtain reparation, if there exiſted any tribunal of juſtice between the European ſtates.

The Engliſh officer who made the capture, ſeems to have had in that point, ſounder ideas than thoſe of the Judge, ſince he did not dare to take upon him to inſiſt on the viſit, until he had been expreſsly authorized to do ſo by the Lords of the Admiralty. This authority not having been produced in the proceſs of the cauſe, it may be reaſonably doubted whether it really gave the power to employ force againſt the Swediſh frigate, in caſe the latter had put the menace of reſiſtance into execution.

III. After having demonſtrated that the 3d propoſition of Sir WILLIAM* is

* See page 87.

neither juſt in itſelf, nor applicable to convoyed veſſels, I proceed to ſhew, that even though we ſhould admit its juſtice in general argument, it cannot apply to the preſent caſe, conſidering the particular nature of the circumſtances of the fact.

It is an acknowledged truth, that an inferior cannot be proſecuted for an act done in purſuance of the order of his ſuperior, inveſted with legal forms, even though this order ſhould be in contradiction with the law: for it does not belong to one in a ſubordinate ſituation, to judge whether an order, which he cannot diſobey without being puniſhable, be legitimate or illegitimate. In a well governed ſtate, you cannot puniſh, for example, ſoldiers or ſubaltern officers, or officers of police, becauſe by virtue of an order of their ſuperiors, they have ſeized perſons or property which ought not to have been ſeized. It is againſt the commanding officer, or the magiſtrate who gave the order, that the party ſhould have recourſe. We know that the captains of convoyed veſſels are bound towards the commander of the eſcort, to a ſubordination full as ſevere as that of common ſoldiers towards their chiefs; the leaſt diſobedience of his orders is rigorouſly

gorouſly puniſhed. Suppoſing then, that the refuſal to ſuffer a viſit were a fault, it could not be imputed to the captains of the merchant veſſels, but only to the commander of the eſcort who ordered this refuſal, or to his Sovereign, if this diſpoſition had been made by his order. The convoyed veſſels, or their cargoes, could not therefore be confiscated for having refuſed the viſit; and the belligerent power could not have any other right but that of demanding from the neutral ſtate, the puniſhment of the commander, or every other kind of ſatisfaction.

The Judge of the Admiralty appears to have felt to a certain point, the conſequence which reſults from this ſubordination of merchant vessels with reſpect to their eſcort, ſince he ſpeaks of the frigate as being the *moſt culpable* (the principal wrong-doer.) From the manner in which he explains himſelf, one might be tempted to believe, that it has been nothing but the *mildneſs* of the Engliſh government, and *its reſpect for the property of an auguſt Sovereign*, which have been able to prevent the Court of Admiralty from proceeding againſt this frigate. Although this Court has often pronounced very ſingular judgments in caſe of maritime

time prizes, I doubt, however, that it has ever ſeriouſly thought of claiming for itſelf a juriſdiction over ſhips of war belonging to the Sovereign of a neutral ſtate, and over his officers.

After having thus eſtabliſhed the principles, we now enter into ſome detail of the circumſtances.

At the time Captain LAWFORD made the ſingular demand of viſiting the Swediſh vessels, the commander of the frigate communicated to him the inſtructions which he had received from his court, and by which it was enjoined him, *not to ſuffer ſuch viſit; to make repreſentations amicably to prevent it; and if they ſhould be ineffectual, to repel force by force.* From this it clearly reſults, that the commander, in his reſiſtance to the viſit, did not act from his own authority, but by the expreſs order of his government.

It is with reaſon that no regard has been paid, in the judgment, to this allegation of the advocates, or other defenders of the Swedes, intereſted in the cauſe--*that theſe inſtructions related only to the pirates of Tripoli, with whom the Swediſh government was then in a ſtate of war*; for it is no

no leſs contradicted by the generality of the terms of the inſtructions, than by the facts. It had been, no doubt, better not to have had recourſe to an argument ſo weak, and which might be cited as an acknowledgement of the legality of the Engliſh pretenſions, unleſs it be regarded as a ſatirical ſtroke, by which the Swedes would have it felt, that they did not expect to be in the ſituation of having recourſe to force againſt civilized nations, but only againſt the pirates of Tripoli.

Be it as it may, after the Swediſh commander had communicated his inſtructions, the queſtion of the viſit became by that very act, a public affair, which not being capable of being triable in the tribunals, ought to be the object of a miniſterial negociation between the two courts. For, the captains of the convoyed veſſels having acted only by the order of the commander of the eſcort, and he by the expreſs order of the court, it is only to the court of Sweden that the Britiſh government ought to addreſs itſelf, if it pretends that in giving thoſe inſtructions, that court had acted contrary to the neutrality of which, until then, it had made profeſſion. On their ſide, the owners of the ſhips ſeized, and of their cargo,

cargo, far from proceeding before the court of admiralty as in an ordinary caſe, ſhould have maintained the incompetence of that court, and required that the affair ſhould be referred to the reſpective courts. And if, notwithſtanding that claim, the admiralty had continued to proceed, its decree, according to all the principles of law, would have been conſidered as null and void. Perhaps ſtill they may have ſome mode of redreſs, either by addreſſing themſelves directly to the Engliſh government, for the purpoſe of obtaining from it a reparation which its equity could not allow it to refuſe, or by way of appeal to the privy council, which, by the Britiſh conſtitution, is the Supreme court, in every thing that belongs to maritime prizes.

It is to be obſerved, that the declaration of the commanding officer, relatively to the nature and the deſtination of the cargoes, being found perfectly conformable with the truth, he cannot be reproached with any fault which could in any manner, not even *ex poſt facto*, juſtify the ſeizure.

We muſt not loſe ſight of this, that in ſuppoſing that the ordinances of marine, which

which ſubject veſſels reſiſting viſit, to confiſcation, may be applied to veſſels ſailing under convoy, theſe ordinances ſuppoſe either a combat or an active reſiſtance; and, according to the expoſition of the facts, ſuch as they are reported in the ſentence, nothing of that kind had taken place. The commander of the convoy confined himſelf to threaten to repel force by force, but he did not fire a ſhot. In all the good criminal laws, they make a great difference with reſpect to the puniſhment between the mere threat and the execution, ſeeing that a great many of thoſe who make threats, do not put them into execution. According to the Daniſh laws, the threat does not regularly involve any puniſhment, as long as it is not accompanied with abuſe; but a man is merely authorized to ſecure the perſon who has threatened, until he ſhall give bail that he will abſtain from all means of effecting the threat. In England, the laws make a very great diſtinction between theſe two caſes*; and one cannot be ſufficiently aſtoniſhed, that an Engliſh judge ſhould rank a mere threat of reſiſting in the ſame claſs with an effective reſiſtance, and apply to the former of

*See BLACKSTONE's Commentaries on the Laws of England, book iii. chap. viii. p. 120, of the 10th London edition, 8vo.

theſe

theſe two caſes, ſo ſevere a penalty as confiſcation, whilſt that, by the very laws on which he relies, it is not pronounced but in the ſecond caſe.

It is without foundation, that the Judge ſeeks to avail himſelf of the carrying off, which was done by an armed force, by the order of the Swediſh commander, of an Engliſh officer who had taken poſſeſſion of one of the veſſels which was under his eſcort; for without inſiſting here upon the illegality of a viſit exerciſed upon convoyed veſſels, the Swediſh commander had indiſputably the right of requiring that the Engliſh ſhould obſerve, upon this occaſion, the formalities to which privateers which attempt to viſit merchant veſſels, are ſubjected. The forgetfulneſs of theſe formalities, was an outrage which he had a right to reſent. And to what length was not this forgetfulneſs carried, if it be conſidered, that inſtead of proceeding openly to the viſit, in the friendly and peaceable manner of which treaties and uſage preſcribe the obligation, the Engliſh commander took advantage of the darkneſs of the night, and employed armed boats, not to viſit the veſſels, but to take poſſeſſion of them by force? Though a violence ſo manifeſt,

feſt, had produced on the part of the Swediſh commander the utmoſt hoſtilities, they could not be conſidered as an illegal reſiſtance, which could authorize the Judge to pronounce the confiſcation; and ſuch, upon this point, is the opinion of VALIN himſelf. That writer, to whoſe authority the Engliſh Judge would not have appealed, if it were leſs favourable to privateering, declares expreſsly, that if the cruizer has not hoiſted his flag while he was preparing for the viſit (which formally excludes all undertaking of this kind during the night) the reſiſtance made by the captain of the merchant veſſel is perfectly legal; and that the confiſcation impoſed by the ordinance, cannot take place.

Beſides, ſuppoſing that this ſpecies of reſiſtance exerciſed by a ſingle veſſel, had been as reprehenſible as it was legal, it could not viſibly bring along with it the confiſcation of the other veſſels, which, as has been ſeen, made no reſiſtance, properly ſo called.

I ſhall not dwell upon the various illegalities which have taken place in this affair; ſuch as theſe---the not having forthwith ſeized the papers of the ſeveral veſſels, and conſequently, the taking

poſſeſſion of theſe ſame ſhips before the party had ſought to ſatisfy himſelf whether they were regular or not---the not having commenced the judicial proceedings until a long time after the detention of the veſſels---the having ſpun them out for a conſiderable time, &c. &c. Although the Judge has acknowledged theſe illegalities in his judgment, they would be of no intereſt in a work, in which it is ſolely propoſed to examine thoſe among the principles on which the ſentence is founded, as could be drawn into precedent in future.

Now to reſume what has been ſaid in treating on the *firſt principle* (*premier motif*) of the judgment, relative *to the form*; I believe I have clearly proved, that the refuſal to ſubmit to the viſit, cannot be conſidered as a ſufficient reaſon to confiſcate the Swediſh veſſels. The following is, in a few words, the ſeries of the principles upon which my demonſtration is founded.

1ſt, *The viſit*, which the cruizers of belligerent powers exerciſe with reſpect to veſſels which they meet at ſea, is not founded upon the *natural Law of Nations*, but only on *the conventional law of nations*; it

it cannot, conſequently, be extended beyond the limits fixed for it by treaties.

2dly, No treaty has ever granted to belligerent powers, the right of viſiting neutral merchant veſſels ſailing under the eſcort of ſhips of war.

3dly, The neutral ſtate which ſhould grant ſuch a right over the veſſels of its ſubjects, which it convoys, would do an act diſhonourable to itſelf, as it would thereby acknowledge that the declarations, which it makes concerning the legality of the commerce of theſe veſſels, do not deſerve any confidence.

4thly, The belligerent powers cannot complain with juſtice, that they are refuſed this right, ſince their cruizers not having by treaties any other right over veſſels not convoyed, than that of *viſiting their papers*, they find in the eſcort granted by the neutral power, an additional ſecurity for the legality of the commerce of the merchant veſſels which are ſailing under its protection.

5thly, The commercial treaties concluded in theſe latter times, agree in rejecting expreſsly, all viſit of neutral veſſels convoyed by ſhips of war.

6thly,

6thly, The illegality of ſuch viſit, is acknowledged by the belligerent powers themſelves, in their regulations for the privateers.

7thly, The refuſal made by a merchant veſſel not convoyed, to ſubmit to the viſit, cannot either by the common (*contumier*) Law of Nations, or by treaties, bring along with it the confiſcation of the veſſel, and ſtill leſs that of the cargo: the only penalty which thence naturally flows is the obligation under which thoſe who refuſe the viſit, are, of ſupporting the damages and the riſques which may reſult to them from this refuſal. It is true, that the *particular* ordinances of the marine of ſome ſtates, pronounce the confiſcation of the veſſel which has oppoſed an active and obſtinate reſiſtance to a viſit demanded in all the requiſite forms; but this confiſcation takes place in that caſe alone, and cannot be extended to the cargo.

8thly, The laws pronounce no penalty for the caſe of a mere refuſal to ſubmit to the viſit, when it is not accompanied with an active and real reſiſtance.

9thly, Merchant veſſels ſailing under convoy, can ſo much the leſs incur the penalty

penalty of confiscation by reaſon of ſuch a refuſal, as they are ſubject to the ſtricteſt ſubordination with reſpect to the commandant of the eſcort.

10thly, The Swediſh veſſels cannot be confiscated, ſeeing that they made no effective reſiſtance, and even though they ſhould have made ſome, it would not be blameable on their part, ſeeing the orders which they received from their commander, and the illegal manner in which the Engliſh commander has proceeded in this affair.

11thly, In general, this buſineſs cannot be for the deciſion of the ordinary tribunal of juſtice, but it ought to be the object of an arrangement negociated between the two courts, ſince it is clear that the Swediſh commander has not acted, but according to the preciſe orders of his government.

SECOND PRINCIPLE.

We now come to the *ſecond principle*, upon which the Judge of the Admiralty has founded his ſentence. This principle, which, as we have ſeen, relates to the merits of the caſe (*au fond de la cauſe*), is drawn

drawn from the nature of the Swediſh cargoes, which the Judge pretends, are liable to confiſcation, as being *merchandizes compriſed under the denomination of contraband in war*, and deſtined for the enemy's ports.

It has been already remarked in a preceding page*, that according to the *natural Law of Nations*, there are no merchandizes, the commerce of which can be reaſonably preſcribed to neutral nations, under pretence that they are contraband; that war not being capable to change, relatively to belligerent nations, the ſituation of thoſe who take no part in it, the commerce which before the war was lawful for theſe latter, ought to be alſo lawful pending its duration; and that in conſequence, the ſubjects of neutral powers cannot be deprived of the right of ſelling to belligerent nations the articles which ſerve for war, as well as every other ſort of merchandize; provided always, that they obſerve in this reſpect the moſt ſtrict impartiality, and that they are as ready to carry on this commerce with the one party as with the other.

From this principle it naturally flows, that the reſtriction by which the exporta-

* See page 65.

tation

tion of cetrain merchandizes to the enemy has been prohibited, under the denomination of *contraband in war*, is ſolely founded *upon the poſitive Law of Nations*; and that in conſequence, no power has a right to give to this prohibition a greater extent, than what it has by the treaties and the uſages generally adopted by civilized nations.--This law--*the neutral flag covers the merchandize*--being become prevalent and generally in the laſt century, it was eſtabliſhed at the ſame time, that no neutral veſſels ſhould be laden with merchandizes which immediately, and in their preſent ſtate, might be imployed in war; ſuch, for example, as gunpowder, artillery, arms, and other military ſtores. Theſe are the only merchandizes which were at firſt comprised under the the name of *contraband in war* (*contreband de guerre*).

The treaties concluded by Portugal with England in 1642 and 1654, and with the United Provinces in 1661, even permitted that theſe merchandizes ſhould be carried to the Spaniards, who were at that time the common enemies of the parties: provided nevertheleſs, that the exportation was not made through Portuguese ports. Spain, in a treaty concluded in 1647 with the Hanſeatic cities, grants them the ſame permiſſion.

permiſſion. Other treaties of the ſame æra between different powers, prohibit expreſsly the exportation of theſe merchandizes to the enemy; but without extending the prohibition beyond that which is truly and immediately *neceſſary to war.*

By the treaty of 1667 between the United Provinces and Sweden, it was expreſsly ſtipulated, that not only coined money, corn, wine and oil, but further, iron, copper, braſs, hemp, cordage, planks, pitch, and tar, ſhould be declared *free merchandizes*; the other treaties of commerce concluded by Holland, in the ſeventeenth century, with France, Spain, and Denmark, contain the ſame determination relatively to goods *contraband in war.*

The Engliſh, in the courſe of their maritime wars, having frequently diſturbed the commerce of the Dutch, the latter obtained in 1668, by a commercial treaty, which was a continuation of that of Breda, that in future wars none ſhould be conſidered as *prohibited merchandizes*, except arms, and other inſtruments of war; the ſame ſtipulation is to be found in the treaty of 1674.

The

The treaty of 1669, between England and Spain, confirmed by all the ſubſequent treaties, in the 24th and 25th articles compriſes only arms and military ſtores under the denomination *of contraband*, and declares all other merchandizes lawful.* The treaty of 1677, between France and England, and the poſterior treaties, reſt, in that reſpect, upon the ſame baſis; as alſo thoſe concluded in 1753 and 1766 between England and Ruſſia. Although the treaties of England, as well with Denmark as with Sweden, depart in ſome reſpects from this general principle, as may be ſeen hereafter, we are fully authorized to conclude from all the preceding treaties, of which it would be eaſy to augment the liſt, that according to *the conventional Law of Nations*, no merchandizes can be conſidered as *contraband in war*, but thoſe deſtined *immediately, and in their preſent form, for the uſe of war*; and that the very ſmall number of treaties which give a greater latitude to that denomination, ought to be conſidered as particular *exceptions to the*

* See, Extracts from ſeveral treaties ſubſiſting between Great Britain and other Kingdoms and States, ſuch articles and clauſes as relate to the duty and conduct of the commanders of his majeſty's ſhips of war; the 3d edition, London, 1758, p. 89 and 90.

general rule; exceptions which cannot either annihilate the rule, or conſequently bind other ſtates than thoſe which have expreſsly conſented to them.

In ſupport of this general rule, may be cited even the ordinances of the French marine, which contain ſo many ſevere diſpoſitions againſt the commerce of neutrals. That of LOUIS XIV. declares liable to confiſcation, only *arms, powder, and military ſtores; alſo horſes and equipages which ſhall be exported for the ſervice of the enemy.** And this rule is repeated in the regulations of the 21ſt of October 1744, and the 26th of July 1778, article 1. By theſe three ordinances, the confiſcation is pronounced only for the *cargo*, and not for *the veſſel*; with the reſervation, nevertheleſs, of the caſe where three-fourths of the entire cargo prove to be contraband; in which caſe, by the laſt ordinance, the veſſel itſelf is alſo confiſcated.

It is true, that the Engliſh, availing themſelves of the preponderance of their marine, to do ſtill greater injury to their enemies, have conſtantly ſtrove to extend,

* Ordinance of the marine of 1681, book iii. title ix. article 2.

as

as far as was poſſible for them, the denomination of *contraband in war.* They have pretended that we ought to compriſe under this name, not only that which is *immediately, and in its preſent form, for the uſe of war*, but alſo that *which is ſuſceptible* of being converted to that uſe, and which may be equally employed by *peaceable individuals* as by *the belligerent ſtate.* It is thus that *timber for building, maſts, cordage, hemp, pitch* and *tar*, and even *proviſions*, are become the object of their prohibitions. For want of ſolid arguments to juſtify this attack upon the Law of Nations and the commerce of neutrals, they have ſought for them, ſometimes in the *particular nature* of the war, and ſometimes in the *civil and canonical law.* The little ſolidity of this former argument has been already ſhewn.* the others have not more. Without pretending to deny that the reſpect paid in unenlightened times to *civil and canonical laws*, is the ſource of ſeveral uſages compriſed under the denomination of the *Cuſtomary Law of Nations*, we cannot on that account conſider even the civil law or the canonical law, as a *general code of the Law of Nations*, particularly in this en-

* See page 28---31.

lightened

lightened age, in which theſe two ſources of modern juriſprudence have ſo much loſt their credit: their application to the preſent caſe would be, beſides, ſo much the more ſtrange, as the prohibition iſſued by the Roman Emperors extended only to their ſubjects,* not to *neutral foreigners*. As to that of the Popes, it confines itſelf to interdicting Chriſtians from ſelling certain merchandizes to *Infidels*, againſt whom they were at the time carrying on the war called *the Cruſades*;† moreover, would it not be ſtrange to ſee the Engliſh, who do not acknowledge the authority of the Emperors, or that of the Popes, ſeeking in ſome ſuperannuated and obſolete laws of theſe two powers, the reaſon of their preſent conduct towards ſtates who glory in not having ſubmitted more than themſelves to that authority?

* See C. 4. Dig. *ad Legem Juliam Majeſtatis*, (liber xlviii. tit. iv.) Lege Julia tenentur---cujus opera, dola malo, hoſtes populi Romani commeatu, armis, telis, equis, pecunia, aliaque quâvis re adjecti erunt. The law 1 and 2 of the code *quae res exportari non debent* (book iv. tit. xli.) forbids the exportation to barbarians, of proviſions and arms, becauſe they were dangerous to the Roman people. It is ſufficient to read theſe laws, to feel that they have been made only for *the ſubjects of the empire*, and not for *neutral foreigners*.

† L. 6. X. de Judaeis. Extravag. Comm. eod. tit. c. 2.

We

We comprehend the injury which this pretenſion of the Engliſh muſt produce to the nations of the north, whoſe principal commerce conſiſts in this ſame building timber, and other articles fit for the conſtruction of ſhips, to which they ſeek to extend their prohibitions. Denmark and Sweden have, in conſequence, ſeveral times united to ſet bounds to them, either by alliances or by repriſals, and this was in fact one of the determining cauſes, and one of the principal objects of the *armed neutrality* *. Among the fundamental rules adopted at that æra, it was eſtabliſhed, that, with the reſervation of the caſe where there ſhould exiſt ſome treaty containing expreſsly a contrary ſtipulation, no belligerent power ſhould conſider as *contraband in war*, other merchandizes than thoſe which might directly, and in their preſent form, be uſed for war, as they are ſpecified in the 10th and 11th articles of the treaty of commerce between Ruſſia and Great Britain. The 10th article of that treaty declares all commerce free, except that of *military ſtores*, or *exports for a blockaded city*. The 11th article deſignates as *contraband in war*, *cannon*, *mortars*, *firelocks*, *piſtols*, and other

* See page 14---17.

fire-arms,

fire-arms, bombs, grenades, bullets, flints, matches, powder, ſaltpetre, ſulphur, cuiraſſes, pikes, ſwords, cartridges, croſs-belts, ſaddles, harneſs; when theſe articles are found on board, in a greater quantity than is neceſſary for the veſſel, the crew, and the paſſengers.

It was eſtabliſhed beſides, that they ſhould confine themſelves to the confiſcation of the contraband merchandizes found on board, but that they ſhould not be at liberty *either to detain the veſſel,* the *paſſengers, or the remainder of the cargo,* or *to give any further interruption to their voyage**.

All the powers which took part *in the armed neutrality,* adopted theſe principles, which, as has been ſeen, were acknowledged in July and Auguſt 1780, by France, Spain, and Holland. England was leſs explicit: ſhe confined herſelf to declaring that ſhe adhered « to the terms « of *different treaties ſubſiſting with the* « *neutral powers*; that the reciprocal « rights and duties are evidently marked « out by the ſolemn engagements, which « (ſaid ſhe) *would become illuſory, if they*

* See MARTENS, vol. i. p. 145, 146.

« *could*

« *could be changed otherwiſe than by mu-*
« *tual conſent.*"*

Since that æra, all the treaties in which mention is made of *contraband in war*, contain determinations conformable with the principles of the *armed neutrality*. Great Britain herſelf has admitted them in the treaties which ſhe has recently concluded with the ſeveral European powers. Such are her treaties with France, of the date of the 26th of September 1786, articles 22 and 23;† and with Ruſſia, of the 25th March 1793, article 4, which confirms that of 1766.§ It is expreſsly declared in the former of theſe two treaties, that *the timber for building, as well as iron, hemp, pitch, and tar*, are *merchandizes free, and of which the importation is lawful*. By the 28th article it is determined, that the merchandizes *contraband in war*, can alone be confiscated; but that *as to the veſſel and the ſurplus of the cargo, they muſt be releaſed*; and that if the captain offers to give up on the ſpot, the

* See in the Collection of CLAUSEN 25, the anſwer of Great Britain of the 1ſt of July 1780, p. 146; that of the Court of France of the 27th July, p. 144; and that of Spain, 7th article, p. 157.

‡ MARTENS, vol. iii. p. 694 and 695.

§ MARTENS, vol. v. p. 210.

prohibited

prohibited merchandizes on board, *he muſt not be in any manner prevented from continuing his voyage.*

If there exiſts, then, any principle generally acknowledged in *the conventional law of nations*, with reſpect to *contraband in war*, it is, that we muſt conſider as ſuch only the *merchandizes which ſerve immediately, and in their preſent form for war*, or, to uſe another expreſſion, only *the arms and military ſtores properly ſo called*; unleſs particular treaties eſtabliſh the contrary; to which caſe the rule of law naturally applies itſelf; *volenti non fit injuria*. *Sulphur* and *ſalt-petre* can alone be conſidered as an exception to this general rule, and are compriſed under the denomination of *contraband in war*; becauſe no doubt the principal, and moſt common uſe of theſe two merchandizes, is to be converted into *gunpowder*, an article which, in our days, is conſidered as of the firſt neceſſity, and, as we may ſay, *eſſential to war*.

It is conſequently inconceivable, that a man ſo enlightened as Sir WILLIAM SCOTT, ſhould advance in his judgment as a ſettled point, that *hemp, pitch, and tar*, are now compriſed under the denomination

mination of *contraband in war*, although, adds he, *theſe articles were not conſidered as ſuch at the time when England concluded its commercial treaty with Sweden*, (that is to ſay, in 1761) *or, at leaſt in 1651, the æra of the treaty in which* WHITLOCK *was employed* under CROMWELL, *and which ſerves as the baſis for that.* For not only hemp, pitch, and tar, are neither *arms or military ſtores*, but they do not even enter into their compoſition. The denomination which the judge gives to theſe merchandizes, is ſo much the more inconceivable, as he has not dared to extend it to *iron*, which conſtitutes a conſiderable part of the Swediſh convoys; although, in fact, iron is of the greateſt and moſt immediate importance for war, *as it enters into the compoſition of all arms whatſoever.*

If the aſſertion of the Judge of the Admiralty were founded, it muſt be matter of aſtoniſhment, that towards the middle of the ſeventeenth century, that which ought to be regarded as *contraband in war*, ſhould have been ſpecified in a more equitable and clear manner than at the preſent; for it is evident that if we compriſe under this name, the merchandizes which after various preparations, ſerve equally for the military and mercantile

marine, the commerce of neutrals would be expoſed to multiplied and endleſs chicaneries; and that there would be no other bounds to prohibitions, than thoſe of the convenience and the caprice of the belligerent powers.

To eſtabliſh ſuch a ſtrange aſſertion, would require, no doubt, very reſpectable and expreſs authorities. Thoſe which the Judge of the Admiralty cites, reduce themſelves to theſe three:

1ſt, A paſſage from VALIN, which ſtates that the materials fit for the building of ſhips are conſidered at preſent, and ſince the commencement of this century, as *contraband in war*, which, ſays he, was not the caſe formerly. 2dly, A like deciſion of VATTEL; and 3dly, The convention paſſed in 1780, between Great Britain and Denmark, to explain the commercial treaty of 1670.

1ſt, As to the work of VALIN, it is eſſential to obſerve in the outſet, that it was compoſed before France had taken part in the American war, and conſequently before the *armed neutrality* had eſtabliſhed the principles, equally wise and invariable, above related, with reſpect to *contra-*

band

band in war: principles to which *all the civilized nations* have ſince that time conformed in all their treaties, with the reſervation of one or two caſes, where different ſtipulations have been dictated by particular circumſtances. We might then paſs over VALIN, for having badly announced before the American war, principles which have not become really *univerſal and inconteſtible*, except ſince that æra; but can we ſhew the ſame indulgence to Sir WILLIAM SCOTT, who, in referring to the authority of that lawyer, in ſupport of an opinion which he maintains to be *prevailing now in* 1799, evidently commits an anachroniſm?

We remark beſides, that the facts upon which VALIN ſupports his propoſition*, cannot ſerve as a baſis for any general principle of the Law of Nations. Theſe facts are, *in the firſt place*, that, in 1704, France declared pitch *contraband in war*; ſaving ſuch as ſhould be found on board Swediſh veſſels, ſeeing that this was a production of their country; *in the ſecond place*, that by the treaty of commerce with Denmark, of the 23d of Auguſt 1742, *pitch, ſail-cloth, hemp, cordage, maſts,*

* See VALIN's new Commentary upon the ordinance of the French marine of 1681, vol. ii, p. 264

and

and building timber, are all alike conſidered *as being contraband.*

The firſt of theſe facts is a mere determination of the moment, occaſioned by the extent which England came to give her prohibitions, and which cannot, conſequently, be conſidered as a general and permanent law. And ſo far from the Judge being able to draw from thence any concluſion favourable to his opinion, it may be ſeen, on the contrary, by the exception which it contains in favour of Swediſh commerce, that neither the court of France, nor probably that of England, conſidered themſelves poſſeſſed of power to prohibit, under the title of *contraband in war*, the commerce which a neutral ſtate carries on in *its own productions.*

With reſpect to the 2d fact, as the queſtion relates to a particular treaty between France and Denmark, relative to ſome *productions foreign* to theſe two countries, there cannot thence reſult any thing prejudicial either to Sweden, or the commerce which every neutral ſtate has a right to carry on in the productions of its own ſoil. This is what Sir WILLIAM would have acknowledged, if he had taken the trouble to compare the *concluſion* of VALIN with the *premiſes* of his argument.

It

It has not, moreover, come to my knowledge, that the French tribunals have ever conſidered as *contraband in war*, any other articles than thoſe which have been declared ſuch by the ordinance of 1681, unleſs authorized to do ſo by an expreſs treaty with ſome particular power. On this point the practice reſts, as well as the ordinance upon principles perfectly juſt. The conduct of this power during the American war, comes in ſupport of my aſſertion. According to the declaration of the cabinet of Verſailles, France took part in the war, only *to defend the liberty of maritime commerce againſt the uſurpations of England.* And at the time when the powers of the north had declared their intention to maintain that liberty, ſo far as concerned neutrals, the court of France, by formal orders addreſſed to the Admiral and Courts of Admiralty, of the dates of the 23d and 30th of May, and the 7th of Auguſt 1780,* forbid the detention of neutral veſſels, and particularly of the Ruſſian, and Swediſh, the Daniſh and the Dutch, *ſaving the caſe where theſe veſſels ſhould carry to the enemy contraband merchandizes, ſuch as*

* See *The Code of Prizes*, printed by order of the King at Paris 1784, 4to. vol. ii. pages 867, 868, 876, and pages 886--887.

arms

arms of any kind whatſoever, or military ſtores. Up to the preſent revolution, the French government has been conſtantly faithful to that principle in all its treaties ſubſequent to the American war, namely, in thoſe with North America, England, Ruſſia, Mecklenbourg, and the city of Hamburgh.

This expoſition is ſufficient, to ſhew that the opinion of VALIN has no weight in this caſe; iſolated, it proves nothing againſt the general cuſtom of Europe, and when we compare it with the practice of the French government, upon which he ſeems to wiſh to found it, we come to a reſult diametrically contrary to that which the Judge of the Admiralty has drawn from it in his ſentence.

2dly, The obſervations which have been made upon VALIN, are in a great part applicable to the opinion of VATTEL, that *timber, and every thing which ſerves for the conſtruction and fitting out of ſhips of war*, are poſitively, in our time, conſidered as *contraband*. His work appeared at London in 1758, an æra when the principles upon this point were not fixed, and when the ſuperiority of the Engliſh navy, and the example of the treaty which

Denmark

Denmark had unfortunately concluded with France in 1742, gave room, on the part of England, to the moſt extravagant pretenſions; and by a ſophiſm common enough to many authors, he takes theſe *pretenſions* for an *acquired right*. Aſſuredly VATTEL could not have fallen into this error, if he had written at the ſame time when the Judge of the Admiralty pronounced his ſentence; or, at leaſt, ſince that multitude of treaties which ſerve, as we may ſay, for the *complement and ſanction* of the principles of the *armed neutrality*. This author obſerves, that the ancient uſage was infinitely more favourable to neutrals than that *of his own time*; ſeeing that before it, the belligerent powers confined themſelves to the *ſeizure* of the cotraband merchandize, on *reimburſing* the owners their value. In ſpeaking of the more rigid practice which came to be introduced, he uſes expreſſions which are far from importing an approbation, and which even announce doubt. *The cuſtoms of Europe*, ſays he, *appear at this day to be generally fixed*, &c. We may eaſily perceive how much, upon what relates to contraband, his opinion has been lightly formed, ſince he compriſes *proviſions themſelves* under this denomination, in the caſe where one of the belligerent

become illuſory, if they could be changed otherwiſe than by mutual conſent--how, I ſay, could ſhe, without the *expreſs conſent of Sweden*, ſubject it to obligations which reſult from the treaties made with the other powers, and which are in *direct* oppoſition to thoſe which ſerve for the baſis of her relations with it? But how much will not this conſequence appear inſupportable, if we conſider that the diſpoſition of which he ſpeaks, *abſolutely concerns* none but *Denmark*, and that it was owing to a *circumſtance peculiar* to that power alone. We have already had occaſion to obſerve,* that by the treaty of commerce of the 23d of Auguſt 1742, between France and Denmark, the prohibition of contraband merchandizes extended particularly to naval ſtores, ſuch as *pitch, ſail-cloth, hemp, cordage, and building timber*. From thence it reſults, that as long as a like clauſe was not added to the treaties ſubſiſting between Great Britain and Denmark, the ſubjects of this latter power might freely export to France, and to its allies, theſe ſame *naval ſtores*, the exportation of which was forbidden to them with regard to Great Britain. It was to put an end to

* See page 138.

this

this ſtate, which gave occaſion on the part of the Engliſh government to a reproach of *partiality in favour of France*, that the court of Denmark conſented to the diſpoſition contained in the explanatory convention of the 4th of July 1780; a diſpoſition ſo contrary to the principles of that court, that in all the treaties which it has concluded ſince that time with other powers, it has conſtantly inſiſted to inſert the word *contraband in war* in its proper ſignification, and that moſt univerſally admitted by all the European powers, by confining it ſolely to that which is really *arms and military ſtores*, and expreſsly declaring *free* and *lawful*, the commerce of thoſe very merchandizes which the Judge of the Admiralty would have conſidered as proſcribed in time of war by the common law of European nations.* This diſpoſition of the treaty

* We may conſult upon this ſubject: 1ſt, The treaty of Denmark with Ruſſia, of the 8-19th of October 1782, article 21 (which is to be found in MARTENS, vol. ii. p. 293 and 298; and in CLAUSEN, p. 180—183) by which it is expreſsly declared, that none but the following articles are compriſed under the liſt of *contraband*, as cannon, mortars, fire-arms, piſtols, bombs, grenades, bullets, balls, fire-locks, flints, matches, powder, ſaltpetre, ſulphur, cuiraſſes, pikes, ſwords, belts, pouches, ſaddles and bridles, excepting nevertheleſs the quantity which may be neceſſary for the defence of the veſſel, &c. and that all

treaty of 1780, between Great Britain and Denmark, is not then, as the Judge pretends, a *change* in the general rule; but merely an *exception* to that rule, which concerns theſe two powers only. And we have already ſhewn, that ſince the time this exception has taken place, the *general rule* is become ſtill more univerſal in the practice, and that it has been *confirmed* by analogous diſpoſitions on the part of ſeveral European powers,* and by

all other *articles whatſoever* not *here deſignated*, ſhall not be liable to confiſcation, and conſequently *ſhall paſs freely without being ſubjected to the leaſt difficulty.* 2dly, The treaty of Denmark with the Republic of Genoa, of the 30th of July 1789 (ſee MARTENS, vol. iv p. 537, and CLAUSEN, p. 254) the 6th article of this treaty declares in the fulleſt detail, every thing meant by *contraband in war (contrebande militaire;)* and the 7th article contains the enumeration of the *lawful merchandizes*, among which are particularly contained pitch or roſin, ſails and cloth of Olonne, hemp, and cordage, timber for building and carpenters' work, which are permitted merchandizes which may be ſold and exported, even to places held and occupied by an enemy of one of the two contracting powers; provided theſe places ſhould not be beſieged or blockaded.

* By the new Pruſſian code, § 203 and following, there is nothing but *arms and military ſtores* which can be declared *contraband*; and maſts, building timber, cordage, ſail-cloth, hemp, pitch, grain, and other articles which may be employed in war after having undergone a preparation; as alſo horſes, are conſidered as *free and lawful merchandizes*.

ſolemn

ſolemn treaties, particularly by thoſe which Great Britain herſelf has conclued as well with France as with Ruſſia.*

After having ſhewn the futility of the reaſoning by which the Judge of the Admiralty pretends to prove, that according to the Law of Nations now exiſting, *naval ſtores*, and, in particular, *pitch*, *tar*, *and hemp*, are reputed *contraband*, I am undoubtedly diſpenſed with from anſwering the argument which he would draw from a judgment given in 1750, by the Lords of Appeal in matter of prizes, in the caſe of the *Maidsgoede Help*, by which a cargo of *pitch and tar*, although *Swediſh produce*, on board a *Swediſh veſſel*, was *confiſcated as contraband*, becauſe it was deſtined for a French port. The reſpect of the Engliſh for the deciſion of their ſuperior courts, is, no doubt, very proper in all the caſes where neither the law or treaties have laid down fixed rules; but when theſe deciſions are in contradiction either to a law or a *clear preciſe treaty*, to take them for the rule of a ſubſequent judgment, is to ſubſtitute the violation of the law for the law itſelf; it is to be found injuſtice upon injuſtice. The Engliſh go-

* See page 132.

vernment

verment has ſo well felt this truth, that ſince that judgment, as the Judge of the Admirality has the candour to acknowledge, inſtead of confiſcating theſe articles on board Swediſh veſſels, it has confined itſelf to *preventing* that they ſhould be carried into the enemy, and to *applying* them to its own uſe, on indemnifying the owner. Although this pretended *right of pre-occupation and pre-emption* (as the Judge calls it), which the Engliſh claim in this particular, be contrary to their treaties with Sweden, it proves at leaſt, in an evident manner, that before Sir WILLIAM SCOTT, the Engliſh goverment did not conſider *pitch, tar, and hemp*, on *board Swediſh veſſels*, as compriſed under the denomination of *contraband in war*.

It is then, on the part of the Judge, a very bold oppinion to which he refers twice in his judgment, when he ſays, that « at the æra of the firſt treaty between « England and Sweden, negotiated by « WHITLOCK, *the nature of theſe merchan-* « *dizes had been ſubject to difficulty*, and « that in conſequence, they choſe to leave « the *queſtion undecided*, by obſerving in « that treaty, and the following, a *pru-* « *dent ſilence upon theſe articles.*" But « that in the ſequel, the *doubt has been re-*

moved

moved by the ſubſequent conſent and general practice of Europe. For if it were ſo, we could ſcarcely conceive, that inſtead of *confiſcating theſe articles as contraband*, they ſhould have confined themſelves in England, to the mere right of *pre-occupation and pre-exemption* of which the judge ſpeaks,

We come now to prove, that the *ſubſequent conſent and general practice of Europe*, agree in ranking the articles to which the queſtion relates, among the *free and lawful merchandizes:* ſuppoſing for the moment, that according to the law univerſally received in Europe, they are really *contraband*, and as even in that caſe nothing could thence reſult prejudicial to the treaties of commerce between England and Sweden, if *clear and preciſe*, let us ſee whether it be true, as the Judge pretends, that by theſe ſame treaties, the queſtion remains *doubtful and undecided* between theſe two powers.

The firſt of theſe treaties, negociated by WHITLOCK with Queen CHRISTINE, under CROMWELL, in 1651, has, according to the report of the Judge, ſerved as a baſis for ſubſequent treaties; the three others, poſterior to the Reſtoration, were concluded

concluded by King CHARLES II. with King CHARLES XI. one of the ſucceſſors of CHRISTINE. Two of them are dated London, the 1ſt Oct. 1661, and 21ſt Oct. 1664; and the laſt, Stockholm the 1ſt March, 1665.

If we attend to the circumſtances in which England was placed at the æra of the treaty of WHITLKCK, and of the neceſſity which CROMWELL was under, of conciliating Sweden to ſerve him for a counterpoiſe againſt Denmark and Holland, which favoured the STUARTS, we ſhall not be aſtoniſhed that the conditions of that treaty ſhould have been advantageous to Sweden. This is what reſults from the papers themſelves of the negociator WHITLOCK, printed in England. We ſee by that treaty, that the productions of the ſoil of Sweden, ſuch as *iron, copper, building and carpenter's timber, maſts, hemp, pitch and tar*, were not compriſed in the enumeration of *contraband merchandizes*, but *coined money*; a diſpoſition prejudical to Engliſh commerce, but uſeful to Sweden, in caſe ſhe ſhould find herſef ar war with Ruſſia or Poland, countries deſtitute of ſpecie. This treaty concluded by Sweden with the uſurper CROMWELL, having giving place to a

treaty

treaty with the legitimate ſovereign of England, the following is the liſt of the articles which were declared *contraband in war*, by the 11th article of the treaty of 1661, and which it was conſequently forbidden to the contracting parties and their ſubjects to carry to the enemy--" Coined money, proviſions, arms, firelocks or their locks, and other things belonging to them; bullets, powder, matches, pikes, ſwords, blades, halberts, cannon, mortars, petards, grenades, croſs-belts, ſaltpetre, muskets, balls, helmets, bucklers, cuiraſſes, and ſeveral other articles of that kind; ſoldiers, horſes, and every thing belonging to the equipment of horſes: ſcabbards, belts, and every other inſtrument of war." As to what concerns *the articles relatively to the marine*, it is ſimply ſtated "that neither party ought to give veſſels of war or tranſports to the enemies of the other contracting party, unleſs it ſhould be willing to expoſe itſelf to this, that they ſhould be regarded as lawful prize, without being able to hope for their recovery." From whence we ſee, that if we except coined money and proviſions, this treaty does not compriſe, under the denomination of contraband, any thing but arms, military ſtores, properly ſo called, ſoldiers and horſes, ſhips

of war and tranſports, but not the *original materials which ſerve for the conſtruction or equipment of ſhips.*

If, inſtead of this long and detailed enumeration, the article in queſtion had contained but a vague and general expreſſion, ſuch as this--" *coined money, proviſions, arms, ammunition, and other things ſerving for war by land and ſea,*" we would underſtand, that in the eyes of the Judge the queſtion relative to *naval ſtores* appeared to have been left in ſome ſort *undetermined*; but this is not the caſe. Every thing which the cuntracting powers wiſhed to prohibit, they have particularly *ſpecified*: every thing which they have not expreſsly *prohibited*, they have *declared free and lawful.* This is what reſults from the concluſion itſelf of the treaty, where it is ſaid, " that it is lawful for the ſubjects of either of the contracting powers *to carry every kind of merchandizes* to enemies of the other, (except thoſe precedently mentioned) *without any interruption being given thereto*; unleſs that they ſhould be deſtined for a port or a place beſieged by the other power.*

The

* Theſe are the terms of the article: Alterutri autem conſœderatorum ejuſque populo ſubditiſve, cum alterius hoſtibus

The treaties of 1664 and 1665, ſuch as we find them in an official extract, publiſhed at Stockholm in 1666,* do not confine themſelves to confirming, in general terms, this diſpoſition of the treaty of 1661. They contain on that point, expreſſions ſo ſtrong and poſitive, that it is abſolutely impoſſible to extend the denomination of *contraband*, to other articles than thoſe which are found in it *ſpecifically deſignated and prohibited* as ſuch. The firſt article ſtates, that† "in the caſe where

hoſtibus commercium habere, üſque merces quaſcunque (de quibus ſupra exceptum non eſt) advehere licebit, idque ſine ullo impedimento niſi iis in portubus locisque, qui ab altero obſidentur.

* The following is the entire paſſage: Extract og Uthtog vthaffdhet ſom emelan Kongl. Mayſt. af Swerige och Kongl. Mayſt. af S ore Britanien angaende Commercierne ar affhandlat och bewiliat jamwal ock vthaff hochſtbemelte wär allernädigſte Konung och Herr for gott befunnit allom Wederborandom vthaff deſs Underſåtare vthi Swerige och dar vender lydande Provincier til eſterrettelſe at publiceras. Stockholm 1666.

† The following is this article, ſuch as we find it in the original Latin: Conventum eſt, quod hoſtibus alterius fœderatorum nullae ſunt advehendae merces, quæ principaliter ad uſum publicum ſpectant; quæ tamen prohibitio neutiquam eo extendenda, ut propterea omnis protinus amicitiæ & mutuus commerciorum uſus cum alterius fœderati hoſtibus eorumque ſubditis omnino tollendus & interdicendus veniat. Nam exiſtente tali caſu, quod unus confœderatorum ipſi bello immixtus non

where one of the powers ſhall find itſelf at war, commerce and navigation ſhall be free to the ſubjects of that which ſhall not have taken any part in it, with the enemies of the other; and that they ſhall, conſequently, be at liberty to carry them *directly all the merchandizes* which are not *ſpecially excepted* by the ſeeond article of the treaty concluded at London in 1661, and by virtue of this ſame article *expreſsly declared prohibited or contraband*, or which are not enemy's property."

The following article renders the matter ſtill more plain:* "And to the end that it may be known to all thoſe who ſhall read theſe preſents, (theſe are its terms) what are *the merchandizes ſpecially excepted and prohibited*, or regarded *as contraband*, it has appeared fit to enumer-

non fuerit, ejus ſubditis ac incolis cum hoſtibus illius fœderati, qui in bello verſatur, *commercia & navigationes liberae erunt* & iiſdem *quaſcunque merces---quae* articulo undecimo tractatus Anglo, Suevici Londinenſis, de anno 1661, *ſpecialiter non exceptae*, nec vigore ejuſdem *expreſſe pro vetitis ſeu contrabandae dictis habitae*, nec hoſtium propriae ſunt, etiam *immediate ad hoſtes tuto advehere licebit*.

* Atque ut conteſt omnibus, qui haec introſpiciunt, quaenam ſint *ſpecialiter exceptae ac vetitae* ſeu pro contrabandis habitae merces; placuit, ut ex ſupra nominato Articulato XImo. Tractatus Londinenſis hec recenſerentur. Sunt itaque *istae ſpecialiter deſignatae* merces, &c.

ate

ate them here, according to the aforeſaid article XI. of the treaty of London. Theſe merchandizes *ſpecially deſignated*, are the following, &c. &c. (Here follows the enumeration contained in the XIth art.)

We may be allowed to think that the Judge of the Admirality had not theſe articles under his eye, when he pretended that by the treaties with Sweden, it remained *doubtful and undetermined*, whether pitch, tar, and hemp, were or not lawful merchandizes; for if he had ſeen into what *minute details* the parties therein enter, *to ſpecify* what ſhould be conſidered as *contraband*--if he had ſeen with what force they there declare *free and lawful*, every thing which is not *ſpecially and expreſsly prohibited* as ſuch, could he have ſeriouſly ſtated as a ſign of doubt the *ſilence* obſerved with reſpect to *naval ſtores?* Muſt he not have acknowledged, on the contrary, that *this ſilence* formally decided the queſtion in favour of Swediſh cargoes?

I believe I have ſhewn in an irreſiſtible manner, that neither by the natural Law of Nations, nor by the poſitive Law of Nations, nor by the particular treaties between

tween England and Sweden, can naval ſtores be conſidered as contraband. From thence it reſults, that the capture of the Swediſh convoy not being in any manner capable of being juſtified by the nature of the cargoes, it was no more in the *merits* than in the *form*, a legal ſubject of confiſcation.

According to ſome conſiderations which in his ſyſtem were equitable, the Judge has divided the coſts, to be defrayed in part by the cargoes, and in part by the claimants. Having proved that this ſyſtem has no foundation, and that, on the contrary, the complaint of the claimants, is in all reſpects legitimate, I think that they are authorized to demand not only the releaſe of their veſſels and of their cargoes, but further, the full reimburſement of their expences, and adequate indemnity for the damage which they have ſuſtained in conſequence of the capture.

Whatever may have been the difficulties of the work to which I have applied myſelf, I ſhall think myſelf completely recompenſed, if it contribute to inſpire belligerent powers with ſome reſpect for the liberty of maritime commerce; and, if in the midſt of the tumults of arms and hoſtile

tile paſſions, the voice of juſtice and reaſon, at length makes itſelf heard in affairs ſo important to the fortune and the repoſe of a numerous and reſpectable claſs of peaceable and induſtrious citizens. On that point, I know too well, that the wiſhes are not the hope . . . . .; I am perſuaded, however, that they will do juſtice to my zeal for truth, as I have been pleaſed to do it to the purity of the intentions, and to the extent of information which the Judge of the Admiralty has made to ſhine in his Judgment; although, from my own conviction, I have not been able to approve either his principles, or the conſequence which he has drawn from them.

REPORT

OF THE

JUDGMENT

OF THE

HIGH COURT OF ADMIRALTY,

UPON

THE SWEDISH CONVOY;

PRONOUNCED BY THE RIGHT HONOURABLE SIR WILLIAM SCOTT, THE 11TH OF JUNE, 1799.

THE SHIP MARIA, PAULSEN, MASTER.

THIS ship was taken in the British channel, in company with several other Swedish vessels sailing under convoy of a Swedish frigate, having cargoes of naval stores and other produce of Sweden on board, by a British squadron under the command of commodore LAFORD.

The facts attending the capture did not sufficiently appear to the court upon the original evidence; it therefore directed further information to be supplied and by both parties.

The additional information now brought in, consists of several attestations made on the part of the captors, and of a copy of the instructions under which the Swedish frigate sailed, transmitted to the king's proctor from the office of the British secretary of state for the foreign department. On the part of the Swedes some attestations and certificates have been introduced, but all of them applying to collateral matter, none relating immediately to the facts of the capture. On this evidence the court has to determine this most important question; for its importance is very sensibly felt by the court. I have, therefore,

therefore taken some time to weigh this matter maturely; I should regret much if that delay has produced any private inconvenience; but I am not conscious (attending to the numerous other weighty causes that daily press upon the attention of the court), that I have interposed more time in forming my judgment than was fairly due to the importance of the question, and to the magnitude of the interest involved in it.

In forming that judgment, I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me;—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference, that justice which the law of nations holds out without distinction to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. It is the duty of the person who sits here, to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain, which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question; a question regarding one of the most important rights of belligerent nations relatively to neutrals.

The only special consideration which I shall notice in favour of Great Britain (and which I am entirely desirous of allowing to Sweden in the same or similar circumstances) is, that the nature of the present war, does give this country the rights of war, relatively to neutral states, in as large a measure as they have been regularly and legally exercised, at any period of modern and civilized times. Whether I estimate the nature of the war justly, I leave to the judgment of Europe, when I declare this as a war in which neutral states themselves have an interest much

more direct and substantial than they have in the ordinary, limited, and private quarrels (if I may so call them) of Great Britain and its great public enemy. That I have a right to advert to such considerations, provided it be done with sobriety and truth, cannot, I think, reasonably be doubted—and, if authority is required, I have authority and not the less weighty in this question for being Swedish authority—I mean the opinion of that distinguished person, one of the most distinguished which that country (fertile as it has been of eminent men) has ever produced, I mean baron PUFFENDORFF. The passage to which I allude, is to be found in a note of BARBEYRAC's, on his larger work, *L.* viii. *c.* 6. *s.* 8.—PUFFENDORF has been consulted in the beginning of the present century, when England and other states were engaged in the confederacy against LOUIS XIV. by a lawyer upon the continent, GRONINGIUS, who was desirous of supporting the claims of neutral commerce in a treatise which he was then projecting. PUFFENDORF concludes his answer to him in these words:

"*I am not surprised that the northern powers should consult the general interests of all Europe, without regard to the complaints of some greedy merchants who care not how things go, provided they can but satisfy their thirst of gain. Those princes wisely judge that it would not become them to take precipitate measures, whilst other nations are combining their whole force to reduce within bounds an insolent and exorbitant power, which threatens Europe with slavery, and the protestant religion with destruction. This being the interest of the northern crowns themselves, it is neither just nor necessary that, for the present advantage they should interrupt so salutary a design, especially as they are at no expence in the affair, and run no hazard.*" In the opinion, then, of this wise and virtuous Swede, the nature and purpose of a war was not entirely to be omitted in the consideration of the warrantable exercise of its rights, relatively to neutral states.---His words are memorable:---"I do not overrate their importance when I pronounce them to be well entitled to the attention of his country."

It might likewise be improper for me to pass entirely without notice, as another preliminary observation (though without meaning to lay any particular stress upon it), that the

the transaction in question took place in the British channel, close upon the British coast, a station over which the crown of England has, from pretty remote antiquity, always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts.

In considering the case, I think it will be advisable for me *first*, to state the facts as they appear in the evidence; *secondly*, to lay down the principles of law which apply generally to such a state of facts; *thirdly*, to examine whether any special circumstances attended the transaction in any part of it, which ought in any manner or degree to affect the application of these principles.

1st The facts of the capture are to be learnt only from the captors; for, as I have observed, the claimants have been entirely silent about them, and that silence gives the strongest confirmation to the truth of the accounts delivered by the captors.

The attestation of captain LAWFORD introduces and verifies his log-book, in which it is stated, that after the meeting of the fleets he sent an officer on board the frigate, to enquire about the cargoes and destination of the merchantmen, and was answered, "that they were Swedes, bound to different ports in the Mediterranean, laden with hemp, iron, pitch, and tar." Upon doubts which captain LAWFORD entertained respecting the conduct he should hold in a situation of some delicacy, he dispatched immediately a messenger to the admiralty, keeping the convoy in view, and having received orders from the admiralty by the return of his messenger, to detain these merchant ships, and carry them into the nearest English port, he sent Sir CHARLES LINDSAY and captain R[illegible]R to communicate them in the civilest terms to the Swedish commodore, who shewed his instructions to repel force by force, if any attempt was made to board the convoy, and declared that he should defend them to the last. The crew of the Swedish frigate were immediately at quarters, matches lighted, and every preparation made for an obstinate resistance; the signal was made on board the British squadron to prepare for battle. In the

the night possession was taken of most of the vessels, the Swedish frigate making many movements, which were narrowly watched by the *Romney*, keeping close under his lee, lower deck guns run out, and every man at his quartets. In the morning the Swedish frigate hoisted out an armed boat, and sent on board one of the vessels which had been taken possession of, and took out by force the British officer who had been left on board, and carried him on board the frigate, where he was detained. The Swedish commander sent an officer of his own on board captain LAWFORD, to complain that he had taken advantage of the night to get possession of his convoy, which was unobserved by him, or he should assuredly have defended them to the last. Upon further conference and representation of the impracticability of resistance to such a superior force, he at length agreed to go into Margate roads, and returned the British officer who had been taken out and detained on board the frigate. After the arrival in Margate roads, he lamented that he had not exchanged broadsides; said that he did not consider his convoy as detained, and should resist any further attempt to take possession of them.

Captain RAPER states, that on going on board the Swedish frigate he found all the men at their quarters, and the ship clear for action; that the commodore shewed his orders, and expressed his firm determination to carry them into execution. Capt. LAWFORD sent a boat with an officer on board several of the convoy, to desire they would follow into Margate roads; their answer was, they would obey no one but their own commodore.

Lieut. M'DOUGAL describes in like terms the menacing appearance and motions of the Swedish frigate. He was sent to take possession of vessels which would not bring to without firing at them. On his going on board one of them, the master declared that he had orders from his commodore not to give up the possession of her to any person whatever, and repeatedly drove away by force the British mariner, who, by his order, took possession of the helm.

Mr. COCKRAFT is another witness to the same effect, and Mr. CANDISH, the officer who was taken by force out of the Swedish merchantman. Expressions of strong reproach

reproach against the proceedings of the English were addressed to him; and the commodore protested, that if he had not been surprised, he would have defended his convoy to the last.

What then do these attestations (uncontradicted attestations) prove? To my apprehension they prove most clearly these facts—That a large number of vessels, connected altogether with each other, and with a frigate which convoyed them, being bound to different ports in the Mediterranean, some declared to be enemy's ports and others not, with cargoes consisting, amongst other things, of naval stores, were met with, close upon the British coast, by His BRITANNIC MAJESTY's cruizers—that a continual resistance was given by the frigate to the act of boarding any of these vessels by the British cruizers, and that extreme violence was threatened in order to prevent it; and that the violence was prevented from proceeding to extremities only by the superior British force which over-awed it---that the act being effected in the night by the prudence of the British commander, the purpose of hostile resistance, so far from being disavowed, was maintained to the last, and complaint made that it had been eluded by a stratagem of the night---that a forcible capture and detention of one British officer who was on board her, and who, as I understand the evidence, was not released till the superiority of the British force had awed this Swedish frigate into something of a stipulated submission.

So far go the general facts.---But all this it is said, might be the ignorance or perverseness of the Swedish officer of the frigate--the folly or the fault of the individual alone. This suggestion is contradicted by Mr. RAPER's log book, which proves that the merchantmen refused to admit the British officers on board, and declared that they would obey nobody but their own commander; a fact to which Mr M'DOUGAL likewise bears testimony. It is contradicted still more forcibly by the the two sets of instructions, those belonging to the frigate and those belonging to the merchant-vessels.---The latter have been brought into Court by themselves, and of the authenticity of the former there is no reasonable doubt: for they are transmitted to me upon the faith of one of the great public offices

fices of the British government, and no person disavows them, and indeed nobody can disavow them, because they were produced by the Swedish captain, who made no secret whatever of their contents. Something of a complaint has been indulged, that the orders from the British Admiralty have not been produced; a singular complaint, considering that they were never called for by the claimants and they were not ordered by the Court; because if the act of the captors was illegal, the orders of the Admiralty would justify it; and the want of orders would not vitiate, if the act was legal. No mystery, however, was made about these; for the communication of orders and instructions was natural and unreserved. It is said that the instructions to the frigate are intended only against cruizers of Tripoli, and an affidavit has been brought in, to shew that the government had begun hostilities against the Swedes.—The language, however, of these instructions is as universal as language possibly can be; it is pointed against the "fleets of any nation whatever." It is, however, said, that this was merely to avoid giving offence to the Tripoline government. But is the Tripolitan government the only government whose delicacy is to be consulted in such matters? Are terms to be used alarming to every other state, merely to save appearances with a government which, they alledge in the affidavit referred to, had already engaged in unjust hostility against them? There is, however, no necessity for me to notice this suggestion very particularly, and for this plain reason, that it is merely a suggestion, neither proved nor attempted to be proved in any manner whatever; and the *res gesta* completely proves the fact to be otherwise, because it is clear that if it had been so the commander of the frigate must have had most implicit instructions to that effect. They could never have put such general instructions on board, meaning that they should be limited in their application to one particular state, without accompanying them with an explanation, either verbal or written, which it was impossible for him to misunderstand. Such explanation was the master-key which they must have provided for his private use; whereas nothing can be more certain than that he had been left without any such restrictive instructions; he therefore acts, as

any

any other man would do, upon the natural sense and meaning of the only instructions he had received. On this part of the case, therefore, the question is, What is it that these general instructions purport?

The terms of the instructions are these—they are incapable of being misunderstood: "In case the commander should meet with any ships of war of other nations, "one or more of any fleet whatever, then the commander "is to treat them with all possible friendship, and not "to give any occasion of enmity; but if you meet with "a foreign armed vessel which should be desirous of "having further assurance that your frigate belongs to "the king of Sweden, then the commander is, by the "Swedish flag and salute, to make known that it is so; "*or if they would make any search amongst the merchant-*"*vessel under your convoy, which ought to be endavoured to* "*be prevented as much as possible, then the commander is, in* "*case such thing should be insisted upon, and that remonstrance* "*could not be amicably made, and that notwithstanding your* "*amicable comportment, the merchant-ships should never-*"*theless be violently attacked, then violence must be opposed* "*against violence.*" Removing mere civility of expression, what is the real import of these instructions? Neither more nor less than this, according to my apprehension:—"If you meet with the cruizers of the belige-"rent states and they express an intention of visiting and "searching the merchant-ships, you are to *talk* them out "of their purpose if you can; and if you can't, you are "to *fight* them out of it." That is the plain English, and, I presume, the plain Swedish of the matter.

Were these instructions confined to the frigate, or were they accepted and acted upon by the merchantmen? That they were acted upon, is already shewn in the affidavits which I have stated; that they were deliberately accepted appears from their own instructions, which exactly tally with them. These instructions declared in express terms, "that all merchant-ships, during the time they are under "convoy of His Majesty's ships, are earnestly forbidden "*to suffer the boats of any foreign nation to board them for* "*the sake of visitation or searching*; but in case such boats "shew an intention of coming alongside, the merchant-"ships are to sheer from them." It appears from the attestation,

testation, that the obedience of these marchantmen outran the letter of their instructions.

Whatever then was done upon this occasion, was not done by the unadvised rashness of one individual, but it was an instructed and premeditated act---an act common to all the parties concerned in it; and and of which every part belongs to all; and for which all the parties, being associated with one common intent, are legally and equitably answerable.

2dly, This being the *actual state* of the fact it is proper for me to examine in the second place, what is their legal state, or in other words, to what considerations they are justly subject, according to the Law of Nations; for which purpose I state a few principles of that system of law, which I take to be incontrovertible.

1st, That the right of visiting and searching merchantships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestible right of the lawfully commissioned cruizers of a belligerent nation. I say, be the ships, the cargoes, and destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points, that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it, who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry, whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissiable rule, that *free ships make free goods*, must admit the exercise of this right, at least for the purpose of ascertaining whether the ships are free or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exersise of it. All writers upon the Law of Nations unanimously acknowledge it, without the exception even of HUBNER himself, the great champion of neutral privileges. In short no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed

breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it is as much as you can, it is still a right of force, though of lawful force, something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit, that wherever force is used, it may be forcibly resisted a lawful force cannot lawfully be resisted. The only case where it can be be so in matters of this nature is in the state of war and conflict between two countries where one party has a perfect right to attack by force and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly co-exist.

2dly, That the authority of the Sovereign of the neutral country being interposed in any manner of mere force, cannot *legally* vary the rights of a lawfully-commissioned belligerent cruizer; I say *legally*, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this Court, I have no right to entertain. All that I assert is that *legally* it cannot be maintained, that if a Swedish commissioned cruizer, during the wars of his own country, has a right by the Law of Nations to visit and examine neutral ships, the KING of ENGLAND, being neutral to Sweden, is authorised by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegial violence to legal right. Two sovereigns may unquestionably agree, if they think fit (as in some late instances they have agreed) by special covenant, that the presence of one of their armed ships along with their merchant-ships, shall be mutually understood to imply, that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than with any other pledge which they may agree mutually to accept. But, surely, no sovereign can legally compel the acceptance of such a security by

mere force. The only security known to the Law of Nations upon this subject, independent of all special covenant, is the right of personal visitation and search to be exercised by those who have the interest to make it. I am not ignorant, that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthrophy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such security were accepted. Upon such unauthorized speculations it is not necessary for me to descant: the law and practice of nations (I include particularly the practice of Sweden, when it happens to be belligerent) give them no sort of countenance; and until that law and practice are new modelled in such a *way* as may surrender the known ancient rights of some nations, so the present convenience of other nations (which nations may perhaps REMEMBER to FORGET them, when they happen to be themselves belligerent), no reverence is due to them; they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of captute in war--that is, in other words to change the nature of hostillity, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a millitary war and a commercial peace. If it were fit that such a state should be introduced, it is at leaft neceffary that it fhould be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system, which has for centuries prevailed among civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expence of the constant hazard of the harmony of states, and of the lives and safeties of innocent individuals.

3dly, That the penalty for the violent contravention of this right, is the confiscation of the property so withheld from visitation and search. For the proof of this I need only refer to VATTEL, one of the most correct, and certainly not the least indulgent of modern professors of public law. In Book III. c. vii. sect. 114, he expresses himself thus: "On ne peut empecher le transport des effets de

"contrabande

" contrabande, si l'on ne visite pas les vaisseaux neutres " que l'on rencontre en mer. On est donc en droit de " les visiter. Quelques nations puissantes ont refusé en " differentes tems se soumettre à cette visite, *aujourd hui* " *un vaisseau neutre, qui refuseroit de souffrir la visite, se* " *feroit condamner par cela seul, comme etant de bonne prise.*" VATTEL is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact is that such is the existing practice of modern Europe. And to be sure the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law, (on which great part of the law of nations is founded) but of the private jurisprudence of most countries in Europe—that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle we find in the celebrated French ordinance of 1681, now in force, article 12, " *That every* " *vessel shall be good prize in case of resistance and combat*;" and VALIN, in his smaller commentary, p. 81, says expressly, that although the expression is in the conjunctive, yet that the *resistance alone is sufficient*. He refers to the Spanish ordinance 1718, evidently copied from it, in which it is expressed in the disjunctive, " *in case of resist-* " *ance or combat.*" And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time in which it occurs to my notice, on the inquiries I have been able to make in the institutes of our own country respecting matters of this nature, excepting what occurs in the Black Book of the admiralty, is in the order of council 1664, article 12, which directs, " that when any ship met withal by the royal navy or other ships commissionated, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize."—A similar article occurs in the proclamation of 1672. I am aware, that in those orders and proclamations are to be found some articles not very consistent with the law of nations, as understood now, or indeed at that time; for they are expressly censured by lord CLARENDON*. But the article I refer to, is not of those he reprehends; and it is observable, that sir ROBERT

* Lord CLARENDON's Life, p. 242.

WISEMAN,

WISEMAN, then the king's advocate-general, who reported upon the articles in 1673, and expresses a disapprobation of some of them, as harsh and novel, does not mark this article with any observation of censure. I am therefore warranted in saying that it was the rule, and the undisputed rule, of the British admiralty. I will not say that that rule may not have been broken in upon, in some instances, by considerations of comity, or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorised to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason; upon the distinct authority of VATTEL, upon the institutes of other great maritime countries, as well as those of our own country—when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruizer, is followed by the legal consequence of confiscation.

3dly, The third proposed inquiry was, Whether any special circumstances preceded, accompanied, or followed the transaction, which ought in any manner or degree to affect the application of the general principles?

1st. The *first* ground of exemption stated on the part of the claimants, is the treaty with Sweden, 1661, article 12; and it was insisted by Dr. LAURENCE*, that although the belligerent country is authorised by the treaty to exercise rights of inquiry in the first instance, yet that these rights were not exercised in the manner therein prescribed. It is an obvious answer to that observation, that this treaty never had in its contemplation the extraordinary case of an armed vessel sent in company with merchantmen, for the very purpose of beating off all inquiry and search. On the contrary it supposes an inquiry for certain papers: and if they are not exhibited, or "*there is any other just*

* Counsel for the Claimants.

and

and strong cause of suspicion," then the ship is to undergo search. The treaty, therefore, recognizes the rights of inquiry and search; and the violation of those rights is not less a violation of the treaty, than it is of the general Law of Nations. It is said, that the demand ought first to have been made upon the frigate: I know of no other rule but that of mere courtesy, which requires this; for this extraordinary case, of an armed ship travelling along with merchant-ships, is not a *casus foederis*, that is at all so provided for in the treaty: however, if it is a rule, it was complied with in the present instance; and the answer returned, was, that "they were Sweedish ships, bound to various ports in the Mediterranean, laden with iron, hemp, pitch, and tar, " The question then comes, What rights accrued upon the receipt of this answer?---I say, first, that a right accrued, of sending on board each particular ship for their several papers; for each particular ship, without doubt, had its own papers, the frigate could not have them: and the captors had a right to send on board them to demand those papers, as well under the treaty as under the general law. A second right that accrued, upon the receiving of this answer, was a right of detaining such vessels as were carrying cargoes so composed, either wholly, or in part, to any ports of the enemies of this country; for that tar, pitch, and hemp, going to the enemy's use, are liable to be seized, as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations; though formerly, when the hostilities of Europe were less naval than they have since become, they were of a disputable nature, and perhaps continued so at the time of making that treaty, or at least at the time of making *that* treaty which is the basis of it; I mean the treaty in which WHITLOCK was employed, in the year 1656: for I conceive that VALIN expresses the truth of this matter, when he says, p. 68 " *De droit* ces choses," speaking of naval stores, " sont de contrabande *aujourd'hui* et depuis le commencemeut de ce siecle, ce qui n'etoit pas autrefois néamoins;" and VATTEL, the best recent writer upon these matters, explicitly admits amongst positive contraband " les bois et tout ce qui sert à la construction et à l'armament des vaisseaux de guerre."—Upon this principle was founded the modern explanatory article

of

of the Danish treaty, entered into in 1780, on the part of Great Britain, by a noble lord*, then secretary of state, whose attention had been peculiarly turned to subjects of this nature. I am therefore of opinion, that although it might be shewn, that the nature of those commodities had been subject to some controversy in the time of WHITLOCK, when the fundamental treaty was constructed, and that, therefore, a discreet silence was observed respecting them in the composition of that treaty, and of the latter treaty derived from it, yet that the exposition which the latter judgement and practice of Europe has given upon this subject, would in some degree affect and apply what the treaties had been content to leave on that indefinite and disputable footing on which the notions, then more generally prevailing in Europe, had placed it. Certain it is, that in the year 1750, the lords of appeal of this country declared pitch and tar, the produce of Sweden, and on board a Swedish ship bound to a French port, to be contraband, and subject to confiscation, in the memorable case of the *Med Good's Hjelpe*. In the more modern understanding of this matter, goods of this nature being the produce of Sweden, and the actual property of Swedes, and conveyed by their own navigation, have been deemed, in British courts of admiralty, upon a principle of indulgence to the native products and ordinary commerce of that country, subject only to the milder rights of pre-occupancy and pre-emption; or to the rights of preventing the goods from being carried to the enemy, and of applying them to your own use, making a just pecuniary compensation for them. But to these rights, being bound to an enemy's port, they are clearly subject, and may be detained without any violation of national or individual justice. Thirdly, another right accrued, that of bringing in for a more deliberate inquiry than could possibly be conducted at sea upon such a number of vessels, even *those* which professed to carry cargoes with a neutral destination. Was there, or was there not a just and grave suspicion which the treaty refers to, excited by the circumstances of such a number of vessels with such cargoes, intended to sail all along the extended coasts of the several

* The late Earl of MANSFIELD.

public

public enemies of this kingdom, under the protection of an armed frigate, associated with them for the very purpose of beating off by force all particular inquiry? But supposing even that there was not, is this the manner in which the observance of the treaty, or of the law of nations, is to be enforced? Certainly not, by the treaty itself; for the remedy for infraction is provided in compensations to be levied, and punishment to be inflicted upon delinquents by their own respective sovereigns. Article 12---How stands it by the general law? I don't say that cases may not occur in which a ship may be authorized, by the natural rights of self-preservation, to defend itself against extreme violence threatened by a cruizer grossly abusing his commission, but where the utmost injury threatened is, the being carried in for an inquiry into the nearest port, subject to a full responsibility in costs and damages, if this is done vexatiously, and without a just cause; a merchant-vessel has not a right to say for it, "I will submit to no such injury, but I will take the law into my own hands by force." What is to be the issue, if each neutral vessel has a right judge for itself in the first instance, whether *it* is rightly detained, and to act upon that judgment to the extent of using force!---surely nothing but battle and bloodshed as often as there is any thing like equality of force or an equality of spirit. For how often will the case occur, in which a neutral vessel will judge itself to be rightly detained? How far the peace of the world will be benefited by taking the matter from off its present footing, and putting it upon this, is for the advocates of such a measure to explain. I take the rule of law to be, that the vessel shall submit to the inquiry proposed, looking with confidence to those tribunals whose noblest office, and, I hope, not the least acceptable to them, is to relieve, by compensation, inconveniences of this kind, where they have happened through accident or error; and to redress, by compensation and punishment, injuries that have been committed by design.

2dly, The *second* special ground taken on the part of the claimants was, that the intention was never carried into act. And I agree with Dr. LAURENCE, that if the intention was voluntarily and clearly abandoned, an intention

so abandoned, or even a ſlight heſitation about it, would not conſtitute a violation of rights. But how ſtands the fact in the present case? The intention gives way, ſo far as it *does* give way, only to a superior force. It is for those who give such instructions to recollect, that the averment of an abandonment of intention cannot possibly be set up, because the instructions are delivered to persons who are bound obey them, and who have no authority to vary. The intention is necessarily unchangable; and, being so, I do not see the person who could fairly contradict me, if I was to assert that the delivery and acceptance of such instructions, and the sailing under them, were sufficient to complete the act of hostility. However that might be, the present fact is, that the commander sails with instructions to prevent inquiry, and search by force, which instructions he is bound to obey, and which he is prevented from acting upon to their utmost extent only by an irresistable force Under such circumstances, how does the presumption of abandonment arise? If it does, mark the consequences: if he meets with a superior force, he abandons his hostile purpose, if he meets with an inferior force, he carries it into complete effect. How much is this short of the ordinary state of actual hostility? What is hostility? It is violence, where you can use violence with success;---and, where you cannot, it is submission, and striking your colours. Nothing can be more clear, upon the perusal of these atteſtations, than that this gentleman abandoned his purpose merely as a subdued person in an unequal contest. The resistance is carried on as far as it can be; and when it can maintain itself no longer, *fugit indignata*.

3dly, It is said that the papers were not immediately taken possession of, nor proceedings instituted till long after the arrival in port. These are unquestionable irregularities: but I agree with the king's advocate in maintaining that they are not such irregularities as will destroy the captors right of proceeding, for the claimant had his remedy in the way of a Monition. How these delays were occasioned, whether in consequence of pending negociation, as has been repeatedly asserted in the course of the argument, I am not judicially informed. If such negotiations ever existed, I may have reason personally to lament

ment that they have proved ineffectual. But the legal consequence of that inefficiency undoubtedly is, that the question of law remains the same as if no such negociation had ever been thought of.

4thly. It is lastly said, that they have proceeded only against the merchant-vessels, and not against the frigate, the principal wrong-doer. On what grounds this was done---whether on that sort of comity and respect which is not unusually shewn to the immediate property of great and august sovereigns, or how otherwise, I am again not judicially informed; but it can be no legal bar to the right of a plantiff to proceed, that he has for some reason or other declined to proceed against another party against whom he had an equal, or, possibly, a superior title. And as to the particular case of one vessel which had obtained her release and a re-delivery of her papers, the act of the captors may perhaps furnish a reasonable ground of distinction with respect to her own special case; but its effect, be it what it may, if confined to herself, can be extended no farther.

I am of opinion, therefore, that special circumstances do not exist, which can take the case out of the rule which has already stated that rule to be the confiscation of all the property forcibly withheld from inquiry and search. It may be fitting (for any thing that I know) that other considerations should be interposed to soften the severity of the rule, if the rule can be justly taxed with severity; but I have neither the knowledge of any such considerations, nor authority to apply them. If any negociations have pledged (as has been intimated) the honour and good faith of the country, I can only say, that it has been much the habit of this country to redeem pledges of so sacred a nature. But my business is merely to decide whether, in a court of the Law of Nations, a pretension can be legally maintained, which has for its purpose neither more nor less than to extinguish the right of maritime capture in war; and to do this, how? by the direct use of hostile force on the part of a neutral state. It is high time that the legal merit of such a pretension should be disposed of one way or other---it has been for some few years past preparing in Europe---it is extremely fit that it should be brought to the test of a judicial decision: for

a worse state of things cannot exist, than that of an undetermined conflict between the ancient Law of Nations, as understood and practised for centuries by civilised nations, and a modern project of innovation, utterly inconsistent with it; and in my apprehension, not more inconsistent with it, than with the amity of neighbouring states, and the personal safety of their respective subjects.

The only remaining question which I have to consider is the matter of expences; and this I think myself bound to dispose of with as much tenderness as I can use, in favour of individuals. It is observed, that the question itself was of an importance and delicacy somewhat beyond the powers of decision belonging to such persons. The authority of their country has been in some degree surprized in this manner--- The captors have been extremely tardy in proceeding to adjudication. Attending to all these considerations, I think the claimants are clearly entitled to have their expences charged upon the value of the property, up to the time of the order for further proof. From that time the property might have been withdrawn upon bail, and it is no answer to the Court to say, that this gentleman or another gentleman, did not think it advisable to commit their private fortunes in the extent of the security required. It is the business of foreign owners who have brought their ships and cargoes into such situations of difficulty, to find means of relieving them when the opportunity can be used. I go sufficient lengths in allowing the expences for the further time in which orders could have been obtained from Sweden, and I fix this at the distance of two months from the order of further proof: and, condemning the ship and cargo, I direct all private adventures to be restored.

This is the substance of what I have to pronounce judicially on this case, after weighing with the most anxious care the several facts, and the learned arguments which have been applied to them. I deliver it to my country—and to foreign countries—with little diffidence in the rectitude of the judgment itself: I have still more satisfaction in feeling an entire confidence in the rectitude of the considerations under which it has been formed.

REMARK

REMARK

ALLUDED TO IN THE NOTE TO PAGE 95.

THE original Danish of this work was scarcely out of the press, when a friend pointed out to me, in the *System of the law of Marine insurances*, by Mr. ARK*, a work considered classic, as well upon the Continent as in England, the note of a sentence pronounced at London, 1785, by the Court which decides in the *Dernier ressorts* in all cases relating to marine insurance, on which occasion, the Judges WILLES, ASHURST and BULLER, who are in the number of the most enlightened whom England boasts, sat in the absence of my Lord Chief Justice MANSFIELD. This sentence is stated in that work, as one of those decisions which establish the jurisprudence, and serve for law in the tribunals. As it rests upon principles diametrically opposite to those of the Judge of the Admiralty, I shall give a short sketch of the case on which it is founded, and of the principle, which dictated it.

During the American war, a neutral vessel belonging to Tuscany, the cargo of which was neutral also, but consigned for London, and insured in that city, was captured on the coast of Barbary by a Spanish cruiser who carried her into a Spanish port. The inferior tribunal pronounced sentence of confiscation upon the ship and the cargo on two grounds: 1st. That the ship having refused to be searched, and resisted with force, as she had fired upon the Spanish cruizer, she was placed by that single act, in the case of confiscation. 2dly, Because she had no *charter party* on board, but only a *manifesto*, detailing all the merchandises comprized in the cargo. A superior court reversed this sentence; but it was con-

* A System of the Law of Marine Insurance, &c the third Edition revised and enlarged, by JAMES ALLEN PARKE, Esq. London, 1796. P. 83, and 393, 395.

firmed

firmed by the Supreme Court, where, however, the want of the *charter party* was not insisted upon, it being considered with reason, as fully supplied by the *manifesto*. No doubt consequently was entertained, but that the ship and cargo were really neutral property; and the only ground of condemnation was, the active and violent resistance which the Captain opposed to the search of the privateer, and the Spanish law which in every uch case pronounces *confiscation*. The fitters out of the condemned veesel having had recourse to the Insurers at London, the latter availed themselves of this same ground to refuse payment of their insurances, alledging, as Sir WILLIAM SCOTT does in his judgment, that the search of neutral vessels on the high sea, is the undisputable right of the cruizers of belligerent powers; that neutral veſſels are bound to submit to this search, on pain of being lawfully considered as enemies; and that the Tuscan Captain having, by his resistance and firing upon the Spanish vessel, failed in that which his neutrality required of him, and placed himself by that very act in the case of confiscation, the insurers were not answerable for the loss which he had manifestly drawn upon himself by his own misconduct.

Notwith tanding all that has been said of the facility with which ngli h insurers elude the demands of owners or fitters out of ships, and although the grounds alledged were of a nature to find favour in the tribunals of a belligerent nation, to which privateering has always appeared of the highest importance for its marine, the three Judges above-mentioned, after having heard the parties, were unanimous in declari.g, that in resisting, as he had done, the search of the Spanish cruizers, the captain of the vessel insured had done nothing unlawful---nothing which comprised the neutrality of the vessel; and in consequence, they sentenced the insurers to pay the insurance agreed on in the policy. Two of these Judges, WILLES and ASHURST, laid it down upon this occasion as a principle, "that the search at sea is an *act of force*, which the cruizer exercises at his own risque and peril, if able;—that if the vessel or the cargo prove to be the property of an enemy, or if the cargo is contraband, the party seizing is justified, and the articles captured are declared lawful prize; but, that in the contrary case, he must

must indemnify the owners, and pay all the costs." Mr. Justice BULLER, in support of this principle, which he adopted in its whole extent, adds the following observation which is equally remarkable :

" The detention in consequense of the particular ordinance of a foreign state, is a risque which the insurer runs; for these ordinances do not form a part of the Law of Nations, and the captain is not culpable if he has infringed them. A vessel is not only bound to take notice of the laws of the country she sails from, and of that to which she sails; but of the particular ordinances of other powers."

Such are, upon what relates to the search at sea of neutral ships, and the right of withdrawing themselves from it when they are able, the principles laid down by the great Judges of England, in a case where, left solely to their own information, and their habitual rectitude, they have not been influenced by considerations of shifting convenience or interested policy. Let us apply them to the case of the Swedish convoy; for this purpose, let us suppose that the ships which composed it were insured at London, and that the judgment of Sir WILLIAM SCOTT having been confirmed by the High Court of Appeal, the owners have no resourse but to come upon the insurers. Should these latter endeavour to elude their engagements, they would only found themselve supon the judgment and the arguments of the Judges of the Admiralty; for however consummate the English lawyers may be in the art of maintaining a cause, where could they find any means of which this Judge, as skilful as enlightened, has not availed himself?

If on its part, the same tribunal which has decided against the insurers of the Tuscan ship, had before it the case of the Swedish convoy, and that there is no doubt, it wished to be consistent, what answer would it not make to the insurers of the convoy?

" You pretend," *this Tribunal would say*, " that the right of searching neutral merchant vessels on the high sea is an indisputable right of the cruizers of belligerent powers*, but you do not prove it; for no law, no obligatory act imposes on neutral vessels the right of submitting, in this particular, to the pretension of cruizers. The

* See Sir WILLIAM SCOTT's Judgment.

search

search which these latter make, is an *act of force*; you allow it --but you say* that it is an act of *legal force*, very nearly resembling an inquiry ordered by a competent Judge in a legal affair, and from which the interested party cannot withdraw himself without incurring the penalties inflicted in case of conviction. We say that your distinction is not more just than your comparison; that the search at sea exercised upon neutral vessels is, in the whole extent of the term, an *act of force*, an act with which no *legal obligation* can consequently correspond; this act is exercised by the cruizers at their peril and risque: and it is clearly lawful for those who are the object of it to withdraw themselves from it when they can.

"In vain would you cite the Spanish ordinance, or that of England, to prove that ships which resist search are subject to confiscation; these are particular ordinances, which make no part of the Law of Nations and to which neutral vessels do not owe obedience. The only laws of this kind, of which a neutral vessel is bound to take notice, are those of the country from which it sails, and those of the country to which it goes."

They might further say, "What we have affirmed, what we have decided to be true, in the case of a single neutral vessel not *convoyed*, is much more still in the case of a fleet of neutral vessels *escorted by a frigot*, *acting by the orders of its Sovereign*. If the former was not bound to take notice of the particular ordinances of the belligerent powers, was not the fleet in question still less so?

If the resistance exercised, the *resistance by armed force* if this former vessel, be an act with which its captain cannot be reproached as an illegal act, with much stronger reason, the *mere menace of resistance*, destitute of all execution, on the part of the Swedish commander, cannot be considered as a fault by which he has, either lawfully or voluntarily incurred confiscation.

The search being, as we have sated it, an act of force exercised at the peril and risque of the cruizer, it thence results, that if the ship detained prove neutral, as also its cargo—if it contain nothing contraband the capture is null, and the party making it condemned to indemnify the owners, and pay all the costs. But as no doubt has arisen, either with respect to the neutrality of the vessels

*See Sir WILLIAM SCOTT's Judgment,

convoyed

convoyed by the Swedish frigate, or that of their cargoes, it is clear that the loss of these ships is not the act of thoſe who commanded them, but that of the Judges who have passed sentence on the detention. This detention, by virtue of a particular ordinance of one of the belligerent states, is a risque which the insurer runs, like all other risques at sea, to which the party insured has not contributed by his own fault.

"You pretend that the Swedish convoys were contraband, and the Judge also has pretended the same; but neither he, nor you, nor the captors, have proved it. They have cited some commentators who affirm it; we have opposed to them formal treaties, which assert the contrary. They have spoken of particular ordinances of some states, but these ordinances constitute no part of the Law of Nations; the treaties, and the treaties alone, serve for its basis. They have cited a treaty between England and Denmark, which declares *hemp*, *pitch* and *tar*, contraband; but this treaty is only binding on these two powers respectively It is no law to Sweden, who has not interfered in it, and who is not subject either to England or Denmark On this point, the treaties between England and Sweden are perfectly clear. They enumerate in the moſt ample detail, every thing which ought to be conſidered as contraband; but the merchandizes found on board the Swediſh veſſels are not compriſed in the enumeration; they are not, therefore, contraband. Theſe treaties declare free and lawful, all the merchandizes which are not expreſsly prohibited; but *hemp*, *pitch*, and *tar*, are not expreſsly prohibited; theſe merchandizes are therefore lawful, and the condemnation which the Judge has pronounced, not reſting upon any fault imputable to the inſured, they are evidently in poſſeſſion of all their rights againſt the inſurers."

This is, in a few words, what reſults from the ſentence reported by Mr. PARK. Such are the means which it furniſhes againſt the ſentence of the Judge of the Admiralty. It is for the enlightened and impartial reader to decide, whether I have had reaſon to ſay, "that this judgment contraſts ſo manifeſtly with the principles of Sir WILLIAM SCOTT, that it alone furniſhes the moſt complete refutation of them." SCHLEGEL.

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